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REPORTS

June 14

OF

CASES ADJUDGED AND DETERMINED

IN THE

COURT OF CHANCERY,

OF THE

STATE OF DELAWARE.

Under authority of the General Assembly

BY

DANIEL M. BATES,

LATE CHANCELLOR.

VOL. II.

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PREFACE.

The present volume of Delaware Chancery Reports contains cases selected from the manuscript notes of the late Chancellors, Johns, Jr. and Harrington, from the year 1833 to 1865. They seem few in number, to be drawn from so long a period. All cases are reported in which the point decided was of any importance, and where sufficient material could be found to make an intelligible report. Without doubt, had there been provision from the beginning for publishing our Chancery decisions many valuable cases would have been preserved which are now lost.

With this volume the reporter completes his report of the decisions of the deceased Chancellors, who were his predecessors in office. It has been to him a grateful work —reviving pleasant recollections of his professional life in years past ; giving him the satisfaction of discharging, in some degree, obligations for many never forgotten acts of courtesy and kindness from the two Chancellors whose labors fill this volume, while practising before them ; and withal greatly deepening that respect which he, in common with the profession, has always felt for the learning, ability and purity of the deceased Chancellors.

JANUARY, 1878.

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The following Chancellors held office during the period covered by the cases reported in this volume :

KENSEY JOHNS, JR., appointed January 18th, 1832 ; died March 28th, 1857.

SAMUEL M. HARRINGTON, appointed May 4th, 1857 ; died November 28th, 1865.

CASES IN CHANCERY.

DELAWARE.

SAMUEL MCDOWELL,

vs.

THE BANK OF WILMINGTON AND BRANDYWINE.

New Castle, Sept. T. 1838.

A bank, being the holder of a promissory note protested for non-payment, has not the right to credit it with deposits made by the debtor to his account as a Justice of the Peace; and its omission to do so does not discharge the indorser.

An agreement by the bank to credit the note with such fees as the debtor might earn as a Notary Public in protesting bills and notes for the bank does not discharge the indorser, though made without his privity.

An agreement between the creditor and the principal debtor, in order to discharge the surety, must be such as gives time to the debtor; and it must be for a consideration.

Under articles of association which had been adopted as part of the charter of the bank it was provided that so long as a stockholder might remain indebted to the bank his stock should not be transferable. *Held*, that the defendant was not liable in damages for refusing to permit the indorser, while still remaining liable on his indorsement, to transfer his stock on the books of the bank.

The maker of a promissory note, after a judgment recovered against the indorser, not a competent witness for the indorser in a suit in equity to restrain the collection of the judgment.

Statement of the case.

Bill in equity to restrain the collection of a judgment at law.—The complainant, Samuel McDowell, indorsed, for the accommodation of the maker, a promissory note made by Thomas McDowell for $500.00, dated October 6th, 1817. The note was discounted by the Bank of Wilmington and Brandywine, the defendant. At its maturity it was protested for non-payment; and afterward an action at law was brought in the Superior Court by the bank against the complainant as the indorser, and judgment was recovered against him on the 7th of April, 1819, for $541.16. After some years of delay the bank proceeded to collect this judgment from the complainant.

The bill, setting forth these facts, further alleged that after the note was protested and judgment recovered, the bank continued to have business transactions with Thomas McDowell, the maker; that they received sundry deposits made by him, sufficient in amount to have paid the note, and against which the bank had the right to charge the note; that, nevertheless, it had suffered the maker to draw his deposits, and had thereby, as the bill insisted, discharged the complainant as the indorser.

It was also alleged that, after the protest of the note, an arrangement was entered into between the bank and the maker, without the privity of the indorser, by which it was agreed that the latter, who was a Justice of the Peace and Notary Public, should protest the notes and bills held by the bank; that his notarial fees should be credited to the note, and that the indorser should not be resorted to. Under this arrangement some credits had been given to the note, but not sufficient to pay it; yet the complainant claimed to be discharged from his liability by force of the agreement. It was further alleged in the bill that the complainant was the owner of thirty-six shares of the capital stock of said bank, which he had sold and attempted to transfer to another person, but that the bank had refused to permit the transfers to be made upon its books;

Statement of the case.

in consequence whereof, the complainant had lost the sale of the stock and sustained damage. The bill prayed an injunction to restrain the collection of the judgment of the bank against the complainant, and that an entry of satisfaction should be made upon the record thereof under a decree of this Court; and also that damages should be decreed to the complainant for the refusal of the bank to permit the transfer of the stock.

The answer admitted the making, indorsing and discounting of the note, and that the same was discounted for the accommodation of the maker, and the proceeds passed to his credit: that Thomas McDowell had received from the bank, since judgment was obtained against the indorser of the note, several sums of money due him for fees as Notary Public and Justice of the Peace; and that the said sums were not retained and applied to or set off against the said note, there being no direction by Thomas McDowell, nor any obligation on the bank so to do: that an arrangement was made between the bank and Thomas McDowell in relation to protests, as stated in the bill; but the answer denied that such arrangement was to continue until the note was paid off, or that payment thereof was not to be demanded of Thomas McDowell, in any other way, whilst he continued to perform his part of the agreement. The answer admitted the payment to Thomas McDowell, for protests under this agreement, of $80 in cash and about $150 by way of credit to his note; and that he had made deposits since April, 1819, "as a Justice of the Peace, but not in his own individual capacity and name;" and it denied that the balances due at any time equaled the said note. The bank did not demand payment of the said judgment from the complainant, because he was insolvent and had been discharged under the insolvent laws of this State. It was admitted that the bank had refused to permit him to transfer his bank stock until he paid the said judgment; and also

Statement of the case.

that it had issued a *scire facias* on the judgment for the purpose of reviving the same, and had obtained judgment thereon; but the defendant alleged that at the time of refusing to allow the said transfer, and before and ever since, there was a by-law of the bank, duly and legally made, "that any stockholder, being indebted to the bank, shall not be at liberty to sell, assign or transfer his stock, or any part thereof, whilst his debt shall remain due and unpaid; and that such dividends shall remain pledged to the bank until such debts be paid, or until they shall be arranged to the satisfaction of the bank; *provided*, that no stock, at a fair market price, should be retained beyond what should be sufficient for the security of the debt that may be payable;" which by-law, the defendant alleged, was a sufficient authority for its said refusal.

The answer further set forth, that Samuel McDowell sued the bank for refusing to let him transfer the said thirty-six shares of bank stock, and on the trial of that suit a verdict was rendered for the defendant, under the charge of the Court, that the said by-law was a good and reasonable by-law, and a sufficient ground for refusing to transfer the stock, and that the said stock stood pledged for the debt; and the answer insisted that it was not incumbent on the bank to apply the deposits of Thomas McDowell to the note; that a judgment having been rendered against the said Samuel McDowell, there must be an actual payment or release to discharge the same.

The case was put at issue and depositions taken. Thomas McDowell proved the agreement in relation to fees for protests, as stated in the bill, and "that this arrangement was to continue until the debt should be paid; and it was expressly understood at the time of making it that recourse was not to be had to the indorser." He also swore that he had no separate account with the bank as Notary Public or Justice of the Peace. In the

account of Thomas McDowell, as it stood upon the ledger of the bank, the letters, "J. P.," were added to his name from August, 1819, to June, 1822. In the accounts subsequent to the latter date, these letters were not added, but the accounts stood in the name of Thomas McDowell. The checks were signed "Thomas McDowell," without any addition. The deposits of McDowell, while the note was in the hands of the bank, at different times, greatly exceeded the amount of it.

The cause came before the Chancellor, at the September Term, 1833, for a hearing upon the bill, answer, exhibits and depositions.

J. A. Bayard, for the complainant, made three points, viz:

1. That the bank having in hand deposits made by Thomas McDowell, the maker of the note, was bound to retain them against the note, and by its omission to do so had lost its remedy against the indorser. *Law vs. East India Co.*, 4 *Ves. Jr.*, 824.

2. That the agreement made with the maker for a particular mode of payment, *i. e.*, by crediting the notarial fees, being without the privity of the indorser, discharged him. 2 *Ves. Jr.* 540; 2 *Bos. & Pull.* 61; 3 *Meriv*, 272.

3. That the indorser, if not liable on the note, had a right to transfer his stock on the books of the bank, and that the refusal to allow the transfer entitles him to damages, which a court of equity, having cognizance of the case, may, for the purpose of doing full justice, decree. 1 *Cox.* 258. 12 *Ves. Jr.* 395. 17 *Ves. Jr.* 273.

J. Wales, for the defendant, took the ground that there was no sufficient proof of the facts relied on by the bill. The deposits made by Thomas McDowell were made by

Opinion.

him as Justice of the Peace, and not on his individual account; and such deposits were not subject to be set off against McDowell's individual debt to the bank. With respect to the alleged agreement that the bank should credit the note with Thomas McDowell's notarial fees and not resort to the indorser, Samuel McDowell, it is denied by the answer of the bank, and is not proved by two witnesses or by one witness with corroborating circumstances sufficient to overcome the answer. This allegation of the bill is supported only by the testimony of Thomas McDowell, the maker of the note. The claim for damages against the bank for its refusal to allow the transfer of Samuel McDowell's stock falls with the failure of the complainant to avoid his liability on the note. For, under the articles of association, which were made a part of the charter, a stockholder, while indebted to the bank, has not the power to transfer the stock. It stands as a security for the debt. Samuel McDowell being indebted to the bank as indorser of this note, no right was violated by the refusal of the bank to permit the transfer.

Johns, Jr., Chancellor.—In this case the complainant relies upon three distinct grounds: on the first two he claims to be entitled to relief, and on the third to damages.

The *first* is, that a creditor is bound, whenever a fund comes into his hands, to apply it in discharge of his debt; and in support of this the decision in 4 *Vesey Jr.* 824, is referred to. In that case the creditor had no right to call on the surety until the accounts were settled. It cannot be considered analogous to the case before the Court, as the bill does not allege the fund to have been in the hands of the creditor until after the judgment was obtained against the indorser. It is, therefore, not necessary for me to consider the general question which might be presented, if the drawer, at the time when the note fell due, had had a sum deposited in bank sufficient to pay the

debt, and the bank, being the creditor, had omitted to charge the note. The complainant has not relied on any matter anterior to the protest and judgment as entitling him to relief. The only inquiry then is, can he claim a discharge from his contract as surety, after the creditor has elected to pursue his legal remedy against him, because the creditor subsequently to the judgment has had other transactions with the party in reference to whom he originally stood as an indorser. The proof in the cause does not clearly and satisfactorily show that Thomas McDowell, in his own individual right and subsequently to the judgment, had any funds in the bank deposited to his credit. The answer admits that he had a small balance of $29.94, and alleges that the same was drawn out before his account as Justice of the Peace was commenced. The only proof to the contrary is that of the maker of the note, connected with several checks and his bank books No. 2 and 3—No. 1, showing the commencement of the account, not having been exhibited. The defendants, in support of their answer, refer to the books of the corporation showing the commencement of the account, and that it was kept with Thomas McDowell as Justice of the Peace. This, then, presents a very different case from that which has been referred to in 4 *Ves. Jr.*; and to apply the principles of that decision, so as to compel a creditor to retain funds deposited by an officer or agent, would manifestly be a violation of the clearest legal, as well as equitable, principles. The funds which came to the hands of Thomas McDowell as a Justice of the Peace, whether they remained in his own possession or were deposited in bank, constituted no part of his individual property, and he could not rightfully have appropriated them in payment of his own debts. If he could not do so, then, clearly, it was not competent for any other person. The bank having recognized the deposit as not being on his individual account, could not, under any pretext, have withheld the same, or pre-

vented the application thereof to the persons lawfully entitled. Should a contrary doctrine be sanctioned in a court of equity, much inconvenience, as well as injustice, would be the result, as it is a common practice for officers and trustees to keep separate accounts in bank. The answer in this case standing uncontradicted but by the oath of the maker of the note, I cannot permit the indorser, after trial and judgment, to avail himself of the testimony of the maker of the note, (who still remains liable) for the purpose of avoiding the payment of the debt.

The *second* ground relied on is the arrangement made relative to the credits derived from the respective protests. If the proof of the agreement, as stated in the bill, that the same was to continue until the note was paid and that the indorser was not to be resorted to had been made by a competent witness, the complainant would clearly be entitled to relief; but, as the answer has denied that any such agreement was made, it was incumbent on the surety to present to the court evidence, in support of the allegation, other than that of the principal. Upon the testimony I am not satisfied, and can only consider the question here presented as depending on the effect of the arrangement as admitted by the answer. If I were to consider this part of the complainant's case as presented in the argument of the complainant's counsel, that an agreement made with the principal, without privity of the surety, discharges the surety, and the testimony of Thomas McDowell is to be received on this point, it is conclusive that the surety was privy to the arrangement; for he says, while it was pending and when it was concluded he informed the surety of the terms and conditions. Considering the arrangement as admitted in the answer, that it was to credit a portion of the fees for protests, does it discharge the surety? Does such an arrangement prejudice the rights of the surety? Does it amount to an agreement which can be considered

as giving time to the drawer ? It is settled that an agreement to give time, to have the effect of discharging an indorser, must be an agreement for which there is consideration, and which suspends the liability of the drawer. Thus, in *Philpot vs. Bryant*, 4 *Bing. R.* 721; 13 *Eng. Com. Law* 128, which was an action by the indorsee against the drawer of a bill, it appeared that shortly before the bill became due the acceptor died, and the bill being dishonored the plaintiff had several interviews with the person who acted for the executrix, in which he stated that the acceptor had left property more than sufficient to pay all his debts. It appeared also, that about twelve months after the bill became due the plaintiff wrote to the executrix requesting to be informed when he might expect payment, and the answer was that there was not then sufficient personal property to pay the bill, but that if he would let the matter stand over the executrix would engage to pay it out of her own private income; to which the plaintiff replied, that, provided the interest was regularly paid, he would give a reasonable time. The interest had since been regularly paid out of the private income of the executrix, according to the agreement. Upon this evidence it was objected, that as the plaintiff consented to give time to the executrix of the acceptor, the defendant, as drawer, was discharged. The objection was overruled, and a verdict was found for the plaintiff. The acceptor of a bill of exchange is considered as the principal debtor. The extended time of payment must be given by a contract that is binding on the holder of the bill. A contract without consideration is not binding on him. The delay in suing is, under such a contract, gratuitous. Notwithstanding such contract he may proceed against the acceptor when he pleases, or recover the amount of the bill from the drawer or indorsers. As the drawer and indorsers are not prevented from taking up the bill by such delay their liability is not discharged by it. To hold them discharged

under such circumstances would be to absolve them from their engagements without any reason for so doing. In the case of the *Arundel Bank vs. Globe*, which is to be found in a note to *Chitty on Bills*, 296,* this point was decided. There, the acceptor of a bill applied to the holders for indulgence for some months; they, in reply, wrote to the acceptor, informing him that they would give him the time that he required, but that they should expect interest; and on a motion for a new trial the Court of King's Bench held, that as *no fresh security* was taken from the acceptor the agreement of the plaintiffs to wait was without consideration and did not discharge the drawer. These cases are much stronger than the present. In this case there was no agreement for any particular time, and the arrangements made to pay out of the charge for protests gave no claim to the holder beyond what the note gave him. The liability of the maker under the note still continued, and the engagement of the maker to pay out of the proceeds of protests amounted to no more than a performance, to that extent, of his original engagement. The holder continued entitled to his money, if he elected to proceed on the note; and the indorser was not precluded from taking up the note and pursuing his remedy against the maker. I am, therefore, of opinion that on this *second* ground the complainant is not entitled to relief.

The only question that remains for consideration is, whether the complainant is entitled to damages on account of the refusal by the bank to allow the transfer of stock. The defendant relies upon the articles of association, which are included in the act of incorporation, and by which it is provided that a stockholder being indebted, while the debt remains due and unpaid, his stock shall not be transferable; a rule by which the stock of such member is made

* In 11th Amer. Edn. of 1849, p. 418. The case here cited does not seem to have been reported; but it is stated in the note in Chitty, and also in *Philpot vs. Bryant*, 4 *Bing.* 721 : 18 *E. C. L.* 128.

subject to satisfy the debts he should owe to the company. In *Montigue on Set Off*, 31, it is said, that if there is an express by-law to subject the stock of each member to a satisfaction of the debt which he owes to the company, such by-law is reasonable and the debt may be set off. The complainant being indebted, must, as a member of the company, be bound by the articles of association; and hence, I am of opinion he could not transfer his stock; and therefore, as the refusal on the part of the bank to permit the transfer violated no right, there can be no foundation for the claim of damages. Upon the consideration I have been able to give the case presented, I am of opinion the complainant has not made out a case entitling him to the interposition of this Court further to restrain the defendant.

Injunction dissolved and bill dismissed.

This decree was reversed by the Court of Errors and Appeals, at the June Term 1834. 1 *Harrington's Rep.* 369. The appellate court differed from the Chancellor in its view of the proof, and not upon the legal principles involved in the case.

Statement of the case.

JOSHUA BAILEY, who has survived SAMUEL LONGSTRETH, late trading as BAILEY & LONGSTRETH, and WILLIAM CUMMINS,

vs.

WILLIAM KENNEDY, and CHARLES P. TALMADGE and MARGARET his wife, et al.

New Castle, Sept, T. 1835.

A debtor, being a member of an insolvent partnership, conveyed his separate real estate in satisfaction of a debt due to a separate creditor. The real estate exceeded in value, to a considerable amount, the debt for the satisfaction of which it was conveyed *Held*, that the other creditors had an interest in the excess, and that in equity the property conveyed would he held as a security, first for the debt due to the grantee, and, as to the excess of value, for other debts.

The real estate conveyed being the separate property of the co-partner the excess of value was bound, first, for his separate debts, and only after satisfying these was it applicable to the debts of the partnership.

BILL TO SET ASIDE A CONVEYANCE OF REAL ESTATE.—This was a bill filed by creditors to set aside a conveyance of real estate, under the circumstances following:

The firm of Kennedy and Denning, (of which William Kennedy, one of the defendants, was a member,) being insolvent, were indebted to the complainants, severally, in sundry judgments. The defendant, Kennedy, was also separately indebted in the sum of $3778.50, with interest from January 13th 1818, to his sister, the wife of Charles P. Talmadge, upon guardian accounts passed by him, as her guardian, while she was a minor. Under these circumstances Kennedy, in consideration of the indebtedness to his sister and in order to secure her from loss, in June, 1820, prior to the recovery of the judgment of the complainants, conveyed

to her his separate real estate, which consisted in part of an estate for his own life, held in a farm in New Castle County, State of Delaware, with which was assigned the stock and personal property thereon. Also, he conveyed to his sister, in fee simple, a farm and two dwelling houses held by him in Talbot County, State of Maryland.

The object of the bill was to set aside the conveyance by Kennedy to his sister. It alleged that, upon a fair settlement, nothing was justly due from him as her guardian; but that at all events the property conveyed greatly exceeded in value the debt appearing by the guardian accounts to be due to Kennedy's sister; that Kennedy continued in the control of the property, and received the rents and profits thereof; and that it was fraudulent and void as being made with the intent to defeat creditors. The prayer was for an account of the personal property and of the rents and profits of the real estate, and that after applying so much thereof as might be necessary to the satisfaction of the debt actually due to Kennedy's sister the balance should be applied to the judgments of the complainants; also, that the conveyance of the real estate should be declared void and the deeds therefor delivered up to be canceled; that the real estate should be re-conveyed to Kennedy and be decreed to be sold for the payment of judgments against Kennedy and Denning.

The answers of William Kennedy and of Charles P. Talmadge and wife admitted the general facts alleged in the bill touching the indebtedness of Kennedy to the complainants; they also set forth his indebtedness to his sister, Mrs. Talmadge, and the conveyance to her of his real estate in Delaware and in Maryland. They alleged that Kennedy's interest in the farm in Delaware, was only an estate for his life, subject to a judgment for $800.00 which his sister had since been obliged to pay; that the farm was stocked by the sister, Mrs. Talmadge; that the property in Maryland was of small value, the rents of which had

not exceeded $15 per annum, and that Kennedy never was offered more than $1200 for the same. The answers alleged that the conveyance was made, not with intent to defraud creditors but in satisfaction of a debt justly due from Kennedy to his sister, and for which it was no more than adequate in value.

Depositions were taken tending to prove the rental value of the several tracts of real estate in controversy, and Kennedy's continued control over the property subsequent to the conveyance. The result of the testimony, so far as it was deemed material, is stated in the opinion of the Chancellor.

The cause came before the Chancellor, at the September Term, 1835, for hearing upon the bill, answers, exhibits, and depositions.

J. A. Bayard, for the complainants, insisted that the denial of fraud by the answer was evasive, and that it was overcome by the proof of facts demonstrative of a fraudulent intent in the conveyance of the real estate.

George Read, Jr., for the defendants.

The denial of fraud by the answers, is full and direct. There is not evidence sufficient to controvert it. The continuance of Kennedy in possession was consistent with the deed, and is therefore no badge of fraud. Nor does mere inadequacy of consideration raise any presumption of fraud, unless it be gross, such as strikes every man as being unjust. Then the question is whether the Court, in a case where a conveyance is made upon a valuable consideration and without fraud, will inquire into the sufficiency of the consideration. Such a conveyance is good within the Statutes of 13 and 27 Elizabeth, which require only that the consideration be valuable and the transaction *bona fide*. Bank-

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ruptcy or insolvency, have nothing to do with the validity of the deed. The question depends upon *bona fides*, and consideration. 5 *Johns*, *R.* 335; 1 *Binney's R.* 502; 8 *T. R.* 528. Both these elements of a valid conveyance exist in this case.

JOHNS, JR., CHANCELLOR.—The complainants are creditors of the late firm of Kennedy and Denning. They have proceeded at law to judgment. The firm being insolvent, and also the individual members, these creditors seek relief in equity, by impeaching, on the ground of fraud, a conveyance made by Kennedy of a part of his real estate to his sister, Margaret Kennedy, now Margaret Talmadge. The grantee took the conveyance in payment and discharge of a separate debt, the grantor conveying his separate property. The consideration for the entire property conveyed was the balance ascertained by the proper officer to be due from Kennedy, as the guardian of his sister, on the settlement of his guardian account, to the amount of $3778.50.

The conveyance was of a life estate in Kennedy in a farm situated in St. George's Hundred, in the State of Delaware, by deed dated, June 1820, for the express consideration of $3000.00. The annual rental value of this farm, may be taken upon the proof to have been $600.00. The property in Maryland appears to have comprised two dwelling houses and a farm. The two dwelling houses were worth together, a rental of $24.00 per annum, and the farm was worth $95.00 per annum. Thus the total annual value of the property conveyed may be set down at $719.00. The annual interest upon the debt due from Kennedy as guardian, would be about $226.00, which sum bring deducted from the annual rental of $719.00, leaves $493.00, as the excess of rent over interest. This sum if regularly applied would, in sixteen years, be sufficient fully to discharge the debt due from the guardian, and leave a

considerable surplus, not less in amount than the sum of $4000.00.

I have gone into this calculation, only to ascertain the effect and operation of this conveyance by Kennedy to his sister, supposing the possession of Kennedy to have been consistent with the deed.

The conveyance in this case, being prior to the Act of Assembly relative to assignments by debtors, is not affected by the provision of that act which avoids any preference among creditors given by a debtor in contemplation of insolvency. At the time when the conveyance in this case was made, a debtor had the power to prefer any creditor; but all such transfers of property as modes of payment must necessarily be subject to the conside a-tion of relative value. They were allowed, prior to the Act of Assembly, upon the principle that a debtor had a right to apply his property in discharge of his debts; and, as he might confess a judgment and thus give a preference to one creditor, he was allowed by assignment to transfer his property for the benefit of his creditors, and in such mode of conveyance to prefer any creditor. As the whole proceeding is based on the principle of payment, it would be wrong to extend it so as to allow a debtor to convey all his property to a single creditor, if it greatly exceeds in value the amount of the debt due. For, by so much as the property conveyed exceeds in value the debt, it would be a gift, a mere gratuity, a voluntary conveyance,—and, if permitted to stand, it would enable the debtor to place his property out of the reach of his creditors, except the one he chose to prefer, and with whom he might, by collusion, so arrange matters as to enjoy all the benefits of the fraud. Hence, in all transfers like the present, which is not an assignment in trust for the benefit of creditors but an absolute conveyance, it is essential to consider the value of the property conveyed and for which the debt is the consideration. If it greatly exceeds the amount

due, then, as to such excess, the other creditors have an interest, and are entitled to have the excess applied in discharge of their debts. This is effected in equity by considering the property conveyed as a security,—first, to the grantee, and on his being fully paid, then that the balance be applied to the other creditors.

As I am of opinion in this case that the value of the property conveyed greatly exceeded the amount of the of the debt due; and considering also that the circumstances attending the transaction are suspicious, I shall direct an account, as prayed for by the bill. It should be observed, however, that this was the separate property of Kennedy and that the complainants are proceeding to collect a partnership debt. The separate creditors of Kennedy must be allowed to come in and be first satisfied before the fund arising from the separate property can be applicable to partnership debts due from Kennedy and Denning.

ELIZA E. COCHRAN, BY HER TRUSTEE, ARNOLD NAUDAIN,

vs.

RICHARD E. COCHRAN, ALBERT G. LEWIS, JEFFERSON LEWIS AND PHOCION LEWIS.

New Castle, Feb. T. 1836.

It is no ground for relief in equity that the debtor in a judgment is deceased and that there is no personal representative of his estate. The creditor has sufficient remedy at law by raising an administration.

Statement of the case—argument.

THIS WAS A BILL IN EQUITY for the collection of a balance due upon a judgment, in the alleged absence of a remedy at law. The judgment was for the sum of $2367.58, recovered May 15th, 1809, in the Superior Court for New Castle County, at suit of James Couper Jr., guardian of Eliza Evans vs. Thomas Boulden, administrator c. t. a. of Philip Lewis, deceased. Eliza Evans afterward intermarried with Richard E. Cochran, to whom, after the marriage, July 20th 1812, the judgment was assigned by the guardian, there being then due a balance of $847.70. Afterward, October 15th, 1824, Richard E. Cochran assigned the same judgment to Arnold Naudain, in trust for the separate use of his wife, Eliza E. Cochran. Thomas Boulden, administrator c. t. a. of Philip Lewis, deceased, the defendant in the judgment, was now dead, and no administrator *de bonis non* had been appointed. The bill was filed in order to recover payment out of the real estate of Philip Lewis deceased,—the defendants, Albert Gallatin Lewis, Jefferson Lewis and Phocion Lewis, being his heirs at law and next of kin.

The answer set up as a defence the staleness of the demand, and alleged sundry circumstances raising a strong presumption that the judgment had been paid, or in some way discharged. But the defence mainly relied on at the hearing was that no process had been taken at law to collect the debt out of the personal estate of defendant in the judgment, Philip Lewis deceased.

The cause came before the Chancellor, at the February T. 1836, for a hearing upon the bill, answers, exhibits and depositions.

R. H. Bayard, for the complainant.

This is a *chose in action* belonging to the wife and is the subject of a trust. That is sufficient to bring the case within the jurisdiction of this Court. But additionally,

the complainant is without a remedy at law, there being no personal representative of the debtor in the judgment.

J. Wales, for the defendants.

The complainant is not without remedy at law. It does not appear that there is not sufficient personal estate of Lewis to pay this debt. The complainant has it in his power to raise an administration and obtain payment of the debt. The Court will not proceed against the land; at least, until the personal estate appears to have been exhausted,

JOHNS JR., CHANCELLOR.—The complainant, by the bill filed in this case, is seeking the recovery of a sum of money due under a judgment assigned to Arnold Naudain.

The legal title, it is alleged, has been transferred by the assignment to Arnold Naudain in trust. The object of the present suit is to enforce the legal right by putting the assignee in possession of the money due on the judgment. There is no question raised relative to the application of the fund. The case presents a claim founded upon a legal right and prosecuted by a party entitled to pursue his legal remedy in the name of the plaintiff in the judgment, unless interrupted by any equity which might exist in favor of the representatives of Philip Lewis, dec'd.

The only ground on which the jurisdiction of this Court is supposed to embrace the complainant's case arises from the want of a party defendant at law, there being no personal representative. But this is not, I apprehend, such a defect as deprives the party of his remedy at law. The creditor has a right to take out letters of administration, and if there are personal assets he may satisfy his debt by retainer; if not, then on application to the Orphans Court he can obtain an order for the sale of the intestate's real estate, and thus reach the land and render it available as

a fund to pay and discharge the judgment. Hence, I am of opinion that in the present case the remedy at law is sufficient; and, therefore, without deciding upon the question of right, I remit the complainant to his remedy at law and order the bill to be dismissed; the complainant to pay the costs.

WILLIAM NEWELL AND SAMUEL NEWELL,

vs.

EVAN F. MORGAN, MARY E. MORGAN, ELIZA MORGAN, THOMAS E. MORGAN AND CATHARINE S. MORGAN.

Sussex, March T. 1886.

The *oldest* judgment creditor at law, having obtained a decree in equity setting aside a fraudulent conveyance to the debtor's children of land purchased by him prior to the recovery of the judgment, is not entitled to a preference in equity in the distribution of the proceeds of the land sold under a decree. In such case the equitable doctrine of distributing assets among creditors *pari passu* applies.

Equity will recognize and give effect to a judicial preference at law by judgment or execution; but such judicial preference arises, not out of the speed of the parties in pressing their claims at law but out of their having obtained a *prior legal lien* upon the property in controversy.

BILL BY CREDITORS TO SET ASIDE A FRAUDULENT CONVEYANCE.—The defendant, Evan F. Morgan, purchased from Daniel Godwin a house and two lots, situated in Lewis, Sussex County, taking a conveyance of the property in fee simple to his children. The deed recited a consideration of $2000.00, *as paid by Evan F. Morgan*; the consideration in

Statement of the case.

fact consisting of a stock of store goods which Morgan exchanged for the house and lots. The deed was duly acknowledged on the 4th of November, 1831, and recorded on the 25th of September, 1832. At the time of this purchase and conveyance Morgan was indebted to sundry persons, and among others to the complainants, for goods to the value of $664.39. The goods sold by the complainants to Morgan were part of the stock with which he purchased the house and lots. On the 7th day of March, 1831, Morgan gave the complainants his judgment bond for $483.39, a balance then due on their account, payable, with interest, at twelve months; on which bond judgment was entered the next day in the Superior Court for Sussex County, and at the expiration of twelve months a *fieri facias* was issued, returnable to the April Term, 1833. The Sheriff returned a sale of goods and proceeds applied to prior executions. The complainants, for themselves and other creditors, then filed this bill against Evan F. Morgan and his children, setting forth the above stated facts; alleging further that Evan F. Morgan had, notwithstanding the conveyance to his children, remained in possession of the property, holding and using it as his own; and it charged that the sale and conveyance was a fraud upon his creditors. The bill prayed that the conveyance might be decreed to be fraudulent as against the complainant and other creditors; that the title *might be considered as having vested in Evan F. Morgan from the date of the deed;* that he might be held to be a trustee &c; and for general relief.

The answer denied the charge of fraud and the equity of the complainants to relief.

The cause, being put at issue and proof taken, came before the Chancellor, at the Feb. T. 1835, for a hearing upon the bill, answer, exhibits and depositions; upon which a decree was rendered, declaring the conveyance fraudulent and void as against creditors of Evan F. Morgan, and directing that the defendants pay to the complain-

ants $570.96, the amount then due on their judgment, in three months, or otherwise that the premises in controversy should be sold and the proceeds brought into Court.

Pursuant to this decree the premises were sold by the Sheriff, on the 18th of July, 1835, for $1130. On the 22d of September, 1835, the sale was returned and confirmed, and the money brought into Court. On the 23d of September, 1835, certain other creditors of Morgan, who had not been parties to the proceeding for setting aside the conveyance, filed their petition, praying to be admitted to come in as parties under the decree and to share in the distribution of the fund. An account was thereupon taken of the creditors of Evan F. Morgan, for ascertaining the amount of these debts and their priorities at law. From this account the complainants were found to be the *oldest judgment creditors* of Morgan.

The cause was heard before the Chancellor, at the March T. 1836, on the question of the distribution of the proceeds of sale among the creditors.

E. Wootten, for the complainant.

E. D. Cullen, for the creditors.

JOHNS, JR., CHANCELLOR. My first impressions were in favor of the preference claimed for the complainants.

I have no doubt that wherever a *legal* right has been established it will be recognized in *equity*. Wherever a party has established a judicial preference at law, by judgment or execution, a court of chancery will recognize such preference and give effect to the right. But the term judicial preference is not used with reference to the speed of the parties in pressing their claims at law, but with reference to their having obtained a prior *legal lien* upon the property. In this case no such *legal lien* was obtained by the complainants. Their judgment never bound the property at law.

Statement of the case.

No claim could be asserted against the property, or the fund arising from it, otherwise than through a court of equity. Considering, then, that none of the creditors have obtained a *legal priority*, I must treat their equities as equal, and adopt the principle of *pari passu* distribution.

Decree accordingly.

On appeal, the Court of Errors and Appeals, at the June T. 1837, affirmed the decree of the Chancellor, so far as it had declared the conveyance of the property to be fraudulent and void and had directed a sale; but the appellate court held that the complainants had, by their superior diligence at law, gained a preference in equity, and were entitled to be first paid out of the fund—the other creditors taking the residue *pari passu*. 2. *Harring. R.* 225.

JOHN CLOUD, ADM'R. OF ANN ELIZABETH KIBLER,

vs.

JACOB WHITEMAN, EXR. OF JACOB WHITEMAN, DECEASED.

New Castle, Feb. T. 1837.

The relief granted in equity must be according to the case made by the bill.

Bill against one charging him as *executor* for payment of a legacy, will not authorize a decree against him personally, as *devisee of land charged with the legacy*.

The prayer for general relief does not sustain such a decree.

BILL FOR RAISING A LEGACY OUT OF REAL ESTATE.—This case arose upon the will of Jacob Whiteman, deceased,

dated April 15th, 1826. The testator, after first directing the payment of all his just debts and funeral expenses, devised to his son, Jacob Whiteman, in fee simple, a tract of land, being part of the plantation on which the testator then resided. He further devised to his son Christian, in fee simple, a tract of land then occupied by Christian; and also bequeathed to his said son, three hundred dollars, to be paid to him in three years after the testator's decease. The testator then bequeathed sundry other legacies to children, all being made payable at a date subsequent to his decease, as follows: to his son, John Whiteman, $300, to be paid to him in three years after the testator's decease; to his daughter, Nancy Whiteman, $300, to be paid to her in three years after his decease; to his daughter, Sarah Whiteman, $300, to be paid to her in three years after his decease; "each of them, my said four children, to be paid the sum of three hundred dollars as aforesaid, in three years after my decease, by my aforesaid son, Jacob Whiteman." The testator then, after making a few small specific bequests, further bequeathed to his aforesaid son, Jacob Whiteman, all his "personal or moveable property," of any kind he had, besides what he had thereinbefore left him, his said son, Jacob Whiteman; "whom," the testator proceeds to say, "I do hereby nominate, ordain and appoint whole and sole executor of this my last will and testament."

The testator died in September, 1832, and Jacob Whiteman, the son, proved the will and took letters testamentary. By his testamentary accounts, duly filed, it appeared that the personal estate of the testator was exhausted by debts and funeral expenses, leaving no personal fund applicable to the legacies. Nancy (or Ann) Whiteman intermarried with Samuel Kibler, and afterward died on the 18th of November, 1833, within three years after the testator's decease. She left issue, a daughter, who intermarried with the complainant, John

Statement of the case

Cloud. The bill was filed by Cloud, as the administrator of Ann Kibler, deceased, the legatee, seeking to recover the legacy, with interest from the time when the legacies were made payable. The bill, however, did not in form seek to charge the defendant as devisee of the land devised to him, but charged him *as executor of the testator.* It contained a specific prayer for relief, that "*if the said Jacob Whiteman shall not admit assets of the said testator to answer the said legacy, then that an account may be taken of the estate and effects of the said testator which have been possessed or received by the said Jacob, or by any other person by his order or to his use, and that the same may be applied in a due course of administration.*" The bill then closed with a prayer for general relief in the usual terms and for a subpœna, which, from the indorsement on the bill appeared to have been issued against Jacob Whiteman as executor of Jacob Whiteman, deceased.

The answer admitted the statements in the bill generally, but denied that the defendant had any assets applicable to the legacy, and showed that as executor he had made a full and true settlement of the estate before the Register of Wills on the 13th of March, 1834, by which it appeared that the whole personal estate was exhausted, and that there was a balance overpaid by the executor of $542.62.

The cause came before the Chancellor at the Feb. T. 1837, for a hearing upon the bill, answer and exhibits.

W. H. Rogers, for the complainant.

J. Wales, for the defendant.

The questions argued related to the construction of the will—whether the legacy bequeathed to Mrs. Kibler was a charge on the real estate devised to the defendant; and

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if so, whether it had sunk into the residue upon her death before the day appointed for payment. No question was raised before the Chancellor as to the frame of the bill.

The Chancellor, at the hearing, doubted whether this will charged the pecuniary legacies on the land, and was of opinion that if such charge existed it had sunk into the residue for the benefit of the devisee on the death of Mrs. Kibler. He, therefore, dismissed the complainant's bill. He afterward expressed a change of opinion upon the points above stated, but adhered to his decree, upon the ground that the bill being filed against the defendant, *as executor of the testator*, he could not in this suit be charged as devisee of the land, and in respect of the land. The charge is personal to the son, and not as representative of the testator's estate, in which capacity there is no liability, and no fund in his hands applicable. The relief granted in equity must be according to the case made by the bill. The prayer for general relief does not meet such a case.

On appeal the decree of the Chancellor, dismissing the bill, was affirmed by the Court of Errors and Appeals, at the June Term 1838, upon the ground that the bill charged the defendant only as executor, in which character, having no assets, he was not liable.

Statement of the case.

FRANCES L. COCHRAN,

vs.

DR. JAMES COUPER, Administrator of DR. THOMAS EVANS, deceased.

New Castle, Feb. T. 1837.

A final decree, entered upon the record and signed by the Chancellor, dismissing the bill, and not directed to be without prejudice, is a bar to another bill filed between the same parties for the same subject matter.

Practice as to rehearings and bills of review.

The complainant, a married woman, had filed a previous bill in equity for arrearages of an annuity, claiming to recover *sui juris* on the ground of a divorce The bill was dismissed for want of proof of the divorce. *Held*, that the decree. not being directed to be without prejudice, was a bar to the present bill filed against the same defendant for the same subject matter.

BILL IN EQUITY FOR ARREARAGES OF AN ANNUITY.—The complainant was entitled, under the will of her first husband, Dr. Thomas Evans, deceased, to an annuity of £24. Evans died in the year 1796. Letters testamentary on his estate were granted to his executors, who passed sundry testamentary accounts and died. Dr. James Couper then became administrator d. b. n., c. t. a. He passed an account in 1812, showing a balance of $456.03, to be disposed of according to the will of the testator. The complainant intermarried with Joseph W. Cochran, from whom she was divorced by an Act of the General Assembly. A bill in equity between the same parties was filed in this Court, at the February Term 1831, setting forth the above facts, and praying a decree against the defendant, as administrator d. b. n., c. t. a. of Thomas Evans, deceased, for the payment of certain alleged arrears of the said annuity; the

Argument.

complainant, though a married woman, seeking to recover *sui juris* on the ground of the divorce. Upon answer filed and issues joined the cause came before the Chancellor for hearing at the February Term, 1833, and on the 4th of May, 1833, a decree was entered upon the record and signed by the Chancellor, dismissing the bill "because of the want of proof of a material allegation, to wit, the divorce of the complainant." Thereupon, an appeal was taken to the Court of Errors and Appeals, which affirmed the decree of the Chancellor.

The present is a bill between the same parties, setting forth substantially the same state of facts and praying similar relief.

The answer of the defendant alleged that the assets collected by the defendant, as administrator d. b. n., c. t. a. of Dr. Thomas Evans, deceased, were paid to other demands, and that nothing was applicable to the complainant's annuity. The defendant also set up, as a bar to this suit, the former bill of the complainant and the decree made thereon, as being final and conclusive of the subject matter.

The cause came before the Chancellor, at the February Term, 1837, for a hearing upon the bill, answer and exhibits.

J. Wales, for the complainant.

The dismissal of a bill in equity does not always operate as a bar to another proceeding for the same subject matter. To have this effect there must have been a hearing upon full proofs and exhibits. Such was not the case here. *Mitford's Eq. Pl.* 89: *Chanc. Cas.* 241. In 1 *Atk. R.* 571, a bill dismissed for want of prosecution was held to be no bar. In 2 *Atk. R.* 44, a bill by a person not having the right to sue was dismissed. Afterward he acquired the right, and the former proceedings were held to be no bar.

Opinion.

It is not unfrequent, where there is a proper case for it, that a bill is dismissed without prejudice. If, in point of fact, the case were one in which, under the circumstances, the proceedings ought not to be a bar, the omission of the formal words in the decree should not preclude a party of his right. It is a subject within the sound discretion of the Chancellor. That the present case is one of that class appears from the ground of the dismissal of the former bill, as set forth on the face of the decree. The ground was a failure in the proof of the divorce of the complainant—a ground not going to the merits of the claim, but only affecting the character in which the party sued. Such a case is within the principle of the decision in 2 *Atkins.*

W. H. Rogers, for the defendant, relied upon what he insisted to be a settled rule of practice, not to be drawn into question, that a dismissal on hearing, and not in terms directed to be without prejudice, is a bar. *Coop. Eq. Pl.* 270.

JOHNS, JR., CHANCELLOR.—The preliminary question presented in this suit, if in favor of the defendant, must necessarily decide the case. It relates to the effect and operation of the former decree, which is relied on by the defendant in his answer as conclusive. It is admitted that the bill filed in this cause is between the same parties and for the same matter in regard to which the former decree was made. The complainant insists that the decree heretofore entered and signed should be considered as made without prejudice, and ought not to be allowed such an effect as to preclude him from proceeding by an original bill. In support of this opinion it is insisted that matter apparent on the face of the decree shows it was not a decision upon the merits; and, therefore, it ought not to be a bar. If this be the rule of practice in a court of equity, then in all cases in which the complainant fails,

either for want of due or sufficient proof or by the mismanagement of his cause, and a decree is had against him, it would require the court again to reinstate him; and, on an original bill, to make a decree which might be directly opposed to the one already pronounced, entered, signed, and existing in full force, and which the Chancellor has no authority to expunge. This would present the singular inconsistency of opposite and contradictory decrees on the docket of the court between the same parties in the same cause. To avoid such consequences the rule of practice has been established, that when a decree has been obtained, and the same is enrolled, the cause cannot be reheard upon petition; and the party aggrieved can, in no case—not even where the decree was on a bill taken *pro confesso*; *Ogilvie v. Herne*, 13 *Ves. Jr. R.* 564; or requires explanation; *Head v. Hamsley*, 1 *Ch. Ca.* 44—set aside the decree or obtain relief against it by original bill, or collaterally, as by another bill for the same cause; *Earl of Darlington v. Pultney*, 3 *Ves. Jr. R.* 386; for then, as is stated in the case of *Ogilvie v. Herne*, 13 *Ves. Jr. R.* 564, the decrees of the court would be contradictory, which would breed the utmost confusion. The only remedy, therefore, in such case is by a bill to set aside the decree for fraud; 3 *Atk. R.* 811; or a bill of review, which lies against those who were parties to the original bill and against them only; 3 *Ch. Reps.* 94; and must be either for error apparent on the face of the decree or upon some new matter, as a release, receipt &c. proved to have been discovered since; for, unless the relief were confined to such new matter, it might be made use of for a vexatious purpose, to be oppressive to the other side, and so the cause would never be at rest. 2 *Madd. Ch. Pr.* 537. Hence, the general rule is that a final decree enrolled, or, according to our course of practice in Delaware, entered and signed, can only be affected by appeal or bill of revivor. If the decree has been entered but not signed by the Chancellor, then it

may be reconsidered on petition to rehear, or on a supplemental bill in the nature of a bill of revivor. If no proceeding has been taken to affect the decree in the manner prescribed by this long-established rule of practice, then, should the complainant against whom the decree has been made attempt to bring the same parties and the same subject matter before the Court, the defendant may plead the former decree, setting forth so much of the former bill and answer as to show that the same point was then in issue. *Child v. Gibson*, 2 *Atk. R.* 603.

This rule of practice, as I have stated it, has been too long established to allow either its propriety or utility to be now questioned. It affords ample means of relief in all cases in which parties injured by decrees are attentive to their rights and avail themselves of the appropriate remedy.

If, then, the decree pronounced heretofore and relied on by defendant in his answer is final and has been entered and signed, it is conclusive unless embraced within the exceptions to the general rule. As I have already observed, the complainant insists that it comes within the reason of the exception, and is the same as a decree dismissing a bill without prejudice. We will therefore advert to the decree, and consider the reason why a party whose bill is dismissed, without prejudice, is allowed to file a new bill. It does appear to me that there is a very material and essential difference between a decree which declares that its effect shall not prejudice and one which, omitting such declaration as to its effect and operation, expresses in terms the reason why it is pronounced. If this statement of the distinction does not render the difference apparent I cannot then discover any sound reason why in all cases, where the complainant fails for want of proof he should not be allowed to file a new bill. The statement of the fact in the decree as a reason for dismissing the bill cannot alter the right, if for failure on such ground the complain-

ant would not be entitled to file a new or original bill. And it must necessarily lead to the recognition of the right of a complainant to renew his proceedings until he corrects every possible error he might commit, although he has had a hearing of his cause.

The reason of the rule allowing a party whose bill is dismissed without prejudice to file a new bill is manifest. By the terms of the decree the right is preserved. The words "without prejudice" have reference to the effect and operation of the decree itself. Decrees in this form are not allowed unless in cases where, from peculiar circumstances, they become essential to afford the party the opportunity of having his cause fairly heard. They are not countenanced where the party has either had a hearing, or by his own negligence fails to present his cause at the hearing fully before the courts, either in the statement or proof of his claim. In all cases, so far as I have examined the decisions, if the complainant, either at law or in equity, submits his cause to the decision of a competent tribunal, and has once obtained that decision, he cannot again present the same case to the same tribunal, unless by application for a new trial at law. or, in equity, by petition for rehearing or bill of review. The only exception at law is in the action of ejectment; and this is founded on a fiction.

In the decree now relied on as a bar to the relief sought by the complainant, it is declared that the bill was dismissed because the complainant failed to prove a material fact, viz: the divorce. This phraseology shows that the cause was heard, and that the complainant failed because he did not establish the case stated in his bill. The decree, therefore, is a decree on hearing of the cause; and I cannot discover upon what principle it can be regarded in any other light than as a final decree. It has been certainly so considered by the complainant, and has been

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appealed from, heard and affirmed in the Court of Errors and Appeals. The party waived his right to bring the matter before the court that pronounced the decree, either for a rehearing or a review, and elected to take the case before an appellate court. The affirmance by the appellate tribunal has certainly not impaired the force and effect of the original decree, although it may have abrogated remedies which would otherwise have afforded the party relief, if he was entitled to it; for, on a rehearing additional evidence may be adduced, if the circumstances of the case sanction it. That the appropriate remedy has not been adopted cannot justify this court in establishing a precedent which would unsettle and derange the order and long recognized practice in Chancery. The rule upon this point of practice is the law of the court, and I know of no authority appertaining to the court which would sanction me either in annulling the rule or dispensing with its full operation. Entertaining the opinion I have expressed on this first point, it is not necessary for me to consider the other matters of defense. The bill must be dismissed.

Syllabus.

PHILIP REYBOLD AND THE FARMERS BANK OF DELAWARE, AT NEW CASTLE,

vs.

WILLIAM HERDMAN, Sheriff, JOHN S. VAN DYKE and Jane his wife, ENOCH ROBERTS, administrator, d. b. n., of ELIZABETH VAN DYKE, deceased, AND ALEXANDER J. VAN DYKE, NICHOLAS VAN DYKE AND CHARLOTTE JANE VAN DYKE, children and heirs at law of JANE VAN DYKE, deceased, infants, defending by their guardian *ad litem*, JOHN S. VAN DYKE.

New Castle, Sept. T. 1837.

The proceeds of lands sold under a mortgage are applicable only to liens and incumbrances against the mortgagor, and not to liens paramount to his title.

The grantor in a deed conveying a lot of land to R., executed a bond of indemnity to R., against a mortgage of the same lot to T.—also against certain paramount liens affecting the land. The bond of indemnity was accompanied by a mortgage to R. of other lands, also covered by the mortgage to T. The lot conveyed to R., and also the other lands embraced in the mortgage of indemnity to him, were all sold by the sheriff under the mortgage to T. *Held*, that R. was entitled, in equity, to be indemnified for the loss of the lot, out of the proceeds of the other lands mortgaged to him for an indemnity;—that he had not, under the indemnity bond accompanying the mortgage, a sufficient remedy at law to bar relief in equity.

Equity will, in some cases, decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the Court entertains bills *quid timet.*

Parties claiming separate and distinct interests in the subject matter of the suit cannot be joined as complainants in the same bill. But, in such case, if one only be entitled to relief, the Court may grant leave to amend the bill by striking out the name of the complainant who is not entitled to relief.

Statement of the case

BILL IN EQUITY, filed under the following circumstances.—John S. Van Dyke was indebted to sundry creditors. and, among others, to Edward Tatnall in the sum of $210.00, secured by his judgment bond and also by a mortgage dated the 18th of October, 1823, executed by himself and Jane his wife, of certain real estate which had descended to the wife from her deceased father, Alexander Jamison. The premises mortgaged embraced a marsh lot, containing ten acres, and also some other lands. Under a *scire facias* upon this mortgage, issued May 28th, 1827, a judgment was recovered in the Court of Common Pleas for New Castle county and a *levari facias*, returnable to the May T. 1828, was issued thereon and directed to William Herdman, one of the defendants, then sheriff, to be executed. Under the *levari facias* the premises were sold for the sum of $1800.00. The property mortgaged had descended to Jane Van Dyke, one of the mortgagors, subject to the lien of certain judgments against her father, Alexander Jamison, recovered in his lifetime, and, among other judgments, subject to one which the Farmer's Bank at New Castle, one of the complainants in this suit, had recovered in the Supreme Court for New Castle County on the 27th of September, 1816, for $560.00; on which judgment there remained due a balance of $487.23. The ten acres of marsh, part of the premises mortgaged to Tatnall, were afterward by deed dated the 8th of April, 1826, conveyed by Van Dyke and wife to Philip Reybold, the other complianant, for the consideration of $210.00. On the 22d of the same month (April) Van Dyke and wife executed and delivered to Reybold a mortgage of the residue of the lands which had been included in the mortgage to Tatnall. It was not the object of the mortgage to Reybold to secure the payment of a sum of money, but it was executed as a collateral security to a bond of indemnity given to Reybold, to indemnify him with respect to the ten acres of marsh against the prior mortgage to Tatnall,

which covered the marsh and also against certain unsatisfied judgments recovered against Alexander Jamison in his lifetime. The fund of $1800.00 in the Sheriff's hands was raised by the sale of all the lands covered by the mortgage to Tatnall, including the ten acres of marsh which had been conveyed to Reybold and the premises embraced in the mortgage of indemnity to Reybold. On the return of sale by the Sheriff, and that he held the proceeds, ($1800.00,) the Sheriff was ruled to bring the money into the Court of Common Pleas; and that Court ordered the payment thereout of the sum due upon the Tatnall mortgage ($582.09,) and afterward directed the residue to be paid back to the Sheriff, to be by him applied according to law. After deducting costs and expenses there remained in the hands of the Sheriff a balance of $1140.69, subject to the rights of the parties to this suit.

The bill was filed by both the Farmer's Bank and Philip Reybold, setting forth the above facts. The claim of the Bank was to have its judgment against Alexander Jamison paid out of the proceeds of the sale under the mortgage of Van Dyke and wife to Tatnall. Reybold claimed to be indemnified out of the same proceeds of sale for the loss of the ten acres of marsh, his title to which, under the deed from Van Dyke and wife, had been divested by the Sheriff's sale under the mortgage to Tatnall—the indemnity claimed being the repayment of the purchase money with interest. The complainant, Reybold, also sought to be relieved against a judgment, alleged to be fraudulent, which was held against Van Dyke by his sister, Elizabeth Van Dyke,deceased, whose administrator, Enoch Roberts, was one of the defendants. This judgment was for the sum of $900.00, and was entered in the Court of Common Pleas, on the 26th of October, 1818. The other defendants were make parties as children and heirs at law of Mrs. Van Dyke.

To this bill only one defendant, William Herdman,

the Sheriff, answered. He admitted the facts stated, and submitted himself ready to pay the money remaining in in his hands, as the same should be directed by the decree of this Court, asking leave to pay the same into court. The other defendants demurred generally to the bill, and assigned the following causes of demurrer, viz:

1. That the complainants have several and distinct interests, and are without any privity between them.

2. That the complainants have a legal remedy against the Sheriff, which is complete and perfect.

3. That, as to the judgment of the Farmer's Bank against Alexander Jamison, deceased, no title to the relief prayed is made out in the bill. That the said Farmer's Bank is not entitled, either at law or in equity, to or in any part of the proceeds of sale in the hands of the Sheriff.

4. That, as to the claim of the other complainant, Philip Reybold, arising out of the sale of the lot of marsh, and out of the mortgage of indemnity executed by Van Dyke and wife to Reybold—the claim being for unliquidated damages and the amount not ascertained, and being proper to be tried by a jury in an action at law, the complainant, Philip Reybold, has failed to make out any title to the relief prayed.

The cause came before the Chancellor, at the September T. 1837, for a hearing upon the demurrer.

W. H. Rogers, for the complainants.

J. A. Bayard, for the defendants.

JOHNS JR., CHANCELLOR.—The 1st, 2d, and 3rd objections to the bill apply to one of the complainants, the President, Directors and Company of the Farmer's Bank of

the State of Delaware. They may all be disposed of by considering the effect and operation of the sale under the mortgage to Tatnall. If the title conveyed by virtue of the sale under the *levari facias* has not affected any legal right or remedy of the Bank, as a judgment creditor of Alexander Jamison, deceased, then,as to that complainant's claim, there can be no necessity for the interposition of this Court. The title mortgaged is the title sold. The sale by the Sheriff, under the *levari facias*, transfers it to the vendee, conveying all the title of the mortgagor—the consideration money representing his interest, and being applicable to liens or incumbrances affecting that interest. If this be not the case, then the contract of the heir by a mortgage, in the case of a bill to foreclose, would require not only the money loaned upon the mortgage to be repaid, but all judgments against the ancestor. The *scire facias*, under our act, is only a more speedy mode of enforcing payment of the sum secured; and it only contemplates a sale for so much as will pay the debt, interest and costs. If it is to be considered as having a more extensive operation, so as to sell and convey a title clear of all liens and incumbrances, as well of the ancestor as of the heir, then the judgment of the Court upon the mortgage, when proceedings are taken by *scire facias*, will have an effect much more extensive than the contract of the parties; and in all cases, where the land has been assigned to more than one heir, if only one mortgages his part, on sale thereof it may be applied to pay the debts due by judgment from the intestate, although all the lands of the intestate are equally liable and could not be sold except upon an inquisition taking all into consideration; or by order of the Orphans Court, although the heir has a right, by tendering his *pro rata* contribution, to exonerate his share. Hence, by considering the proceeds of sale under a *levari facias* upon the heir's mortgage as applicable to the judgment due from the intestate manifest injustice might be done. If I am

correct in considering the sale under the *levari facias* as transferring no more or greater interest than the mortgagor had at the time of the mortgage executed, then it follows that the purchase money only represents that interest or estate, and the vendee takes the title subject to all paramount liens and incumbrances. If so, then the proceeds of sale can only be applicable to the liens or incumbrances discharged by virtue of the sale, and must necessarily be confined to the payment of the liens or incumbrances created by the mortgagor. Hence, I apprehend the interest or estate transferred by the Sheriff's sale must be ascertained by the extent and operation of the contract under which the lien accrues. The mortgagor conveys the title as he had it, and can do no more.

John S. Van Dyke and wife held the estate they conveyed by the indenture of mortgage to Tatnall, subject to the liens and incumbrances on it created by Alexander Jamison, the intestate, from whom the land descended. They conveyed the title as it existed in them. The judgment on that mortgage could only be against the mortgagors and terre tenants. The heirs and personal representatives of Alexander Jamison deceased could not be parties. The judgment could, therefore, only affect those legally parties and their interest. Hence, the only interest sold was the derivative, or the estate of John S. Van Dyke and Jane his wife in the premises, and not the title as it existed in Alexander Jamison. That interest remained unaffected and still subject to all legal liabilities. I am, therefore, of opinion that the demurrer must be allowed with respect to the claim of the Farmer's Bank. They yet have their judgment and a full and complete legal remedy.

The next inquiry relates to the claim of the other complainant, Philip Reybold. His claim is founded on the contract of indemnity contained in the indenture of mortgage executed by John S. Van Dyke and wife,

and the bond of John S. Van Dyke and the judgment thereon. The premises mortgaged were, by the terms of the contract, conveyed to Reybold, not to secure the payment of a sum of money, but, as stated in the complainant's bill, to indemnify him against the claim under the Tatnall mortgage upon the ten acres of marsh sold and conveyed by John S. Van Dyke and wife for the sum of $210.00 to Philip Reybold, and also against the unsatisfied judgments recovered against Alexander Jamison in his lifetime. The bill states the sale under Tatnall's mortgage of this ten acres of marsh, as also of all the premises embraced in the mortgage of indemnity to Reybold. The demurrer admits the facts, as alleged, and also the amount of damage; for that is stated and claimed in the bill as being the consideration money paid for the ten acres of marsh. But this complainant not only comes for relief on the ground that he is deprived of the real estate mortgaged as an indemnity, but additionally to be relieved against the prior judgment of Elizabeth Van Dyke, which he alleges to be fraudulent. The administrator, d. b. n., of Elizabeth Van Dyke, deceased, has not answered, but has joined in the general demurrer. The parties on whom the fraud is charged have united in the demurrer, which insists that this complainant is not entitled to relief on several grounds;—

First: For want of privity between the complainants, whose interests are distinct. With respect to the Farmer's Bank this objection need not be considered; because I have already held the 2d and 3d objections to be valid against the claim of the Farmer's Bank. The claim of Reybold, the other complainant, stands upon totally different grounds. Should it be found, on examination, that the other objections are not tenable as against his claim, and that if, as a sole complainant, he would be entitled to relief, the present objection founded on the misjoinder of

the Bank as a complainant is such as could be met by an amendment of the bill.

Second: I shall, therefore, proceed to the next cause of demurrer, viz: that the complainant, Reybold, has an adequate remedy at law. The mortgage to Tatnall having been given prior to that made to Reybold, it is apparent that by the sale under it any interest of Reybold in the mortgaged premises has been utterly defeated; and unless he can reach the proceeds of the sale as representing the land he is remediless. No process at law can affect the land; the remedy contemplated by the mortgage *in rem* has failed. The security by bond and the judgment thereon only affected the husband's interest. The substantial security was the fee-simple interest of the wife, which by the mortgage was conveyed, and by the conveyance constituted the substantial indemnity. The mortgage having been executed, not to secure the payment of a sum of money, but to indemnify Reybold as the purchaser of the ten acres of marsh, it may be considered doubtful how far the claim of Reybold by any proceeding at law upon the Sheriff's recognizance would have availed. The facts necessary to establish the right must have been ascertained and judicially decided; and this could not be except as against parties and privies to the contract of indemnity. Hence, the remedy at law does not appear to me to be complete and perfect.

Third: The remaining cause of demurrer, applicable solely to the claim of the complainant Reybold, is that the damages being unliquidated and the amount not ascertained, therefore, the complainant, Philip Reybold, has not made out a title to the relief prayed. Under the peculiar circumstances of this case, and especially as the indemnity was based upon a liability which affected the realty, and not exclusively on a personal liability, I cannot regard this objection as tenable. Upon this point I would refer

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to the opinion of Chancellor Kent in the case of *Champion v. Brown*, 6 *Johns Ch. R.* 405. He says "there are cases to show that equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the Court entertains bills *quia timet.* Thus, in *Ranelaugh v. Hayes*, 1 *Vern. R.* 189; 2 *Ch. Cas.* 146,80, K. assigned several shares of the excise to H., who covenanted to indemnify and save K. harmless from all debts, accounts, covenants and demands whatsoever, by reason of any of the covenants or agreements entered into by K. and contained in the letters patent, &c. K., being sued by the King, filed his bill against H. and prayed for a performance of the agreement in specie, alleging that the defendant wholly refused to perform the covenants on his part, but in breach thereof permitted K. to be sued by the King. It was not charged, nor proved, that any rent was actually in arrear; and the defendant objected to the suit, as being founded on a personal covenant of indemnity, which sounded only in damages, and for which the plaintiff had his remedy at law. But Lord Keeper North decreed a specific performance and directed a reference to a master to tax the damages, and that, as often as any breach should happen, he should report the same specially to the Court, and that H. ought to be decreed to clear K. from all these suits and encumbrances within the reasonable time of a year. He compared the case to that of a surety in a bond, for whom, though not molested for the debt, yet after the money is payable, the Court will decree the principal to discharge it; for it is unreasonable that a surety should always have such a claim hanging over him.

Sir Joseph Jekyll, Master of the Rolls, in *Lee v. Rook*, *Moseley* 318, made a similar observation in respect to the rights of a surety. "If I borrow money," says he, "on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my

estate disencumbered by him, and the covenant in the mortgage deed to pay the money will bind the principal; for, the money being borrowed for him, it is his debt, and the surety is only a nominal person. And why may not the administrator come into this Court and call upon the defendants to clear the estate of P. from the covenants of P. to C. and S.?" There are many other cases, besides the one already cited, in which Chancery has sustained bills for a specific performance of personal covenants sounding in damages, and which have no concern with real estate. The case of *Ward v. The Duke of Buckingham*, cited by Lord Hardwicke, and again by Lord Eldon, 3 *Atk. R.* 385; 10 *Ves. Jr. R.* 161, may be referred to as an instance; and Lord Hardwicke held, in *Buxton v. Lister*, 3 *Atk. R.* 383, that a bill could be entertained by a vendor for the specific performance of an agreement for the sale of wood. But, in cases relating to the realty, the jurisdiction is much more freely exercised; and Lord Hardwicke took notice of a marked distinction between the two cases. In *Pember v. Mathers*, 1 *Bro. Ch. Rep.* 52, Lord Thurlow sustained a bill by the seller against the assignee of a lease for the specific performance of an agreement to indemnify and to execute a bond to secure the indemnity.

In the case before me the defendants, who were parties to the bond and mortgage of indemnity, by the covenant of indemnity undertook to indemnify and relieve the ten acres of marsh sold and conveyed to Reybold from certain claims, for one of which it has been since sold; and he now claims out of the purchase money the benefit of the covenant, the land mortgaged as security having been converted into money. The sale has deprived him of the legal remedy under the mortgage as against the mortgaged premises. I can perceive no good reason why, as the purchase money representing the land still remains within the reach of this Court, the complainant should not be entitled to relief. But in consequence of the President and

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Directors of the Farmer's Bank being joined as complainants with Philip Reybold, and it appearing that the Farmer's Bank have no interest, I am of opinion that the present demurrer ought to be allowed. See 4 *Russ. Ch. R.* (4 *Eng. Ch. Rep.*) 225, 242. The complainant, however, has leave to amend his bill.

JEREMIAH F. KINNEY,

vs.

NEHEMIAH REDDEN AND MESHACH ELLIOTT.

New Castle, Sept. T. 1837.

An injunction will not be granted to restrain a party, holding the legal title to an undivided share of intestate real estate, from exercising the right, attaching to such share, of accepting the intestate real estate in the Orphans Court.

MOTION FOR AN INJUNCTION TO RESTRAIN THE ACCEPTANCE OF INTESTATE LANDS IN THE ORPHANS COURT.—The complainant had filed a bill for the specific performance of a parol contract between himself and the defendant, Nehemiah Redden, for the conveyance of an undivided share of the intestate real estate of Nathaniel Mitchell deceased, situated in Sussex county. The undivided share in controversy had descended to William J. Mitchell, the eldest son of the intestate; Redden having purchased this share at Sheriff's sale under an execution against Mitchell. The bill set forth the terms of the parol contract, and alleged a part performance of it by the delivery of possession of

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the premises to the complainant; and prayed a decree for specific performance. At the filing of the bill proceedings for partition of the intestate real estate of Nathaniel Mitchell, deceased, were pending in the Orphans Court. The freeholders appointed to make partition had returned to the Court that the lands could not be divided, without detriment to the parties interested, and that they had valued the same at $1703.61. Redden, after the making of the alleged parol contract with the complainant for the sale of the share of the intestate real estate which he held as assignee of William J. Mitchell, had sold and conveyed the same to Meshach Elliott, the other defendant in this suit; and Elliott as the assignee, having the legal title to this share, was about to exercise the right, attaching to it as the share of the eldest heir at law, to accept the lands at the valuation returned by the freeholders appointed to make partition. At this stage of the proceedings the complainant's bill was filed, and a motion made for an injunction to restrain the defendant, Elliott, from exercising his right of acceptance. The bill, in addition to the prayer for relief, prayed for an injunction to restrain the acceptance of the lands.

C. G. Ridgely, for the complainant.

R. Frame, for the defendant.

JOHNS, JR., CHANCELLOR.—The Orphans Court has exclusive jurisdiction as to the question of acceptance, the legislative provision on the subject having made that Court the tribunal primarily to decide, as in that Court alone the right can be exercised. To enjoin its proceeding and delay the exercise of the right of acceptance, because the party having it has contracted to sell by parol, and no deed executed, would be a serious injury to the other parties interested in the estate and entitled to their shares

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of the valuation money. The question of right, or who is entitled to be admitted to accept, must be decided in the Orphans Court. If that Court err, the right of appeal exists. Injunction to restrain the party from claiming and exercising his right of acceptance, therefore, is not granted.

JEREMIAH KINNEY,

vs.

NEHEMIAH REDDEN AND MESHACH ELLIOTT.

Sussex, March T. 1838.

A party, who by his own negligence or default has prevented or unreasonably delayed the full execution of a contract for the sale of lands, will not be relieved by a decree for specific performance. This principle applies to a contract though it be reduced to writing;—*a fortiori* to a parol contract sought to be enforced on the ground of part performance.

The ground upon which Equity enforces a parol contract, part performed, is the prevention of fraud upon the party by whom there has been a part performance. To entitle such a party to relief it must appear that he will, in consequence of the part performance, suffer detriment, unless relieved, and that he has been himself in no default.

A vendee, under a parol contract for the sale of lands, was let into possession and permitted to cut timber upon the premises sold; the vendor's title deed was delivered to a conveyancer selected to prepare a conveyance of the premises, and the tenant was referred to the vendee as the person authorized to let the premises for the ensuing year. The vendee withdrew the vendor's title deed from the conveyancer and neglected, on request, to return it or to proceed to the full execution of

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the contract ; also he neglected to assign to the vendor a judgment which was to be taken in part payment of the purchase money, or to pay any part of the purchase money. Under these circumstances the vendor resold the premises and conveyed them to another purchaser. Bill by the original vendee, for a specific performance, dismissed.

BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF A PAROL CONTRACT FOR THE CONVEYANCE OF LANDS.—The defendant, Nehemiah Redden, held by purchase at Sheriff's sale under an execution against William J. Mitchell, the said Mitchell's undivided share of the intestate real estate of his deceased father, Nathaniel Mitchell, situated in Sussex County. The bill alleged that Redden had, in the month of April 1836, entered into a parol contract to sell and convey said share to the complainant; in consideration whereof the complainant was to pay the expense which Redden had incurred on account of said share, with interest from the date of the purchase of Mitchell's share ; Redden agreeing to accept, in part payment, the assignment of a judgment held by the complainant against Taylor and Short for $321.00, and also to account to the complainant for the rents and profits which he had received from the lands. The bill further alleged that, in part performance of the contract, the complainant was let into possession of the lands, Redden having previously held the same in possession and accounted with the heirs at law of Nathaniel Mitchell, deceased, who were entitled to the other shares, for the rents and profits ; further, that the tenant of the lands was directed by Redden to bargain with the complainant for the future renting of the premises ; that the complainant, as the purchaser and with Redden's assent, proceeded to cut timber on the same; that at the time of the contract Cyrus Windsor, a conveyancer, was selected to prepare a deed for the conveyance of the premises to the complainant and the title papers of Redden were for that purpose delivered to Windsor. The complainant alleged that, after the making of the contract to

convey to him the said undivided share of real estate the defendant, Redden, had sold and conveyed the same to the other defendant, Meshach Elliott, thereby disabling himself from conveying said share to the complainant; that the defendant, Elliott, after the purchase of said undivided share, had, as assignee thereof, accepted the intestate real estate in the Orphans Court, at the valuation thereof—said share being entitled to the right of acceptance; that the defendant, Elliott, still held the said intestate real estate. The bill alleged that he had purchased with notice of the complainant's equity; and the bill, therefore, prayed that the defendant, Elliott, should be decreed to execute and deliver to the complainant the said undivided share of real estate, so as specifically to perform the contract of the defendant, Redden; the complainant tendering himself ready to perform the contract on his part.

The answers of the defendants admitted the making of the parol contract at the time and on the terms alleged in the bill; also that Cyrus Windsor was at the time of making the contract selected to prepare a deed pursuant thereto, and that the title papers of Redden, consisting of a deed for said undivided share, was for that purpose delivered to Windsor. The answers denied that the complainant was let into possession of the premises; or that he was permitted to cut timber thereon, although he had cut some wood without authority. The answers alleged as a defence that the complainant had himself prevented the execution of the contract; that he took the Sheriff's deed out of the possession of Windsor, the person chosen to draw a conveyance pursuant to the contract, before there had been time to prepare such conveyance, and had refused, at the request of the defendant, Redden, to return the same; that the complainant had not assigned to Redden the judgment held against Taylor and Short in part payment of the purchase money, nor had offered to do so until the month of September, five months after the making

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of the contract; that the defendant, Redden, having done all in his power to carry the contract into effect soon after it was entered into, and being prevented from completing it by the negligence and delay of the complainant, was compelled to treat the contract as abandoned; and, for the purpose of effecting a sale of his property, he had proceeded to dispose of the same at public auction, at which the defendant, Elliot, became the purchaser; that such sale was advertised publicly for three or four weeks, and was generally known throughout the neighborhood; yet that the complainant never tendered himself ready to comply with the terms of the contract on his part until long after the sale and conveyance to Elliot; nor did the complainant make known to the defendant, Redden, that he objected to the sale until the evening of the day prior to the day of sale.

The answer of the defendant, Elliott, did not deny that he had purchased with a knowledge of the complainant's claim, but relied on the facts above set forth as amounting to a forfeiture of any right the complainant might originally have had.

The defendants also pleaded the statute which requires that a contract for the sale of any interest in lands shall be in writing; and it was further insisted in the argument that by virtue of the proceedings for partition in the Orphans Court and the acceptance of the premises by Elliott, at the valuation thereof, the undivided share sold by Redden to the complainant had been extinguished; that thereby the specific performance of the contract by a conveyance *in specie* of the subject matter of the contract was rendered impossible; and that the Court had no power to decree a performance of it otherwise than strictly according to its terms.

The cause was put at issue and depositions taken on both sides. There was a considerable body of testimony

on the part of the complainant, tending to prove the making of the contract, the delivery of the deed to Windsor, the possession and acts of ownership on the part of the complainant and admissions by the defendant, Redden, of his having made the sale to complainant. The result of the proof, so far as it was material to the questions raised, is set forth in the opinion of the Chancellor.

The cause came before the Chancellor, at the March T. 1838, for hearing upon the bill, answers, exhibits and depositions.

C. G. Ridgely, for the complainant.

R. Frame, for the defendants.

JOHNS, JR., CHANCELLOR.—It appears from the bill, answers, and proofs in this cause that the defendant, in the month of April 1836, entered into a parol agreement to sell the land to complainant for what he had paid for it at Sheriff's sale and the costs of conveyance, and also to refund the rents received. And it further appears that the parties selected the person who was to draw the deed in a few days, as by the agreement of both in his presence.

In part payment of the consideration money the defendant agreed to take an assignment of a judgment against Taylor and Short for $321; and the rents and profits received by the defendant for his share of the land were to be repaid to the vendee. Soon after the verbal agreement the defendant, considering that he had made sale of the premises, allowed complainant to cut timber, and directed the tenant to bargain with complainant about the future renting of the property; he also delivered to Windsor the Sheriff's deed, that he might draw the deed, as agreed upon by both parties, in a few days. Under this state of things, and the vendor having done all he could to execute the

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agreement, and having placed his property out of his control for the benefit of the complainant, it appears that the vendee, the complainant in this cause, without the consent of the vendor, took the Sheriff's deed out of the possession of Windsor, the person in whose hands it had been placed for the purpose of drawing the deed, and thus prevented the deed being prepared in the time agreed upon by the parties; and he further refused to return it, when required at the instance of the defendant. In addition to this interference on the part of the present complainant, who is now seeking a specific performance, it does not appear that the judgment which was to have been assigned as part payment of the consideration money was assigned, or that any offer was ever made to assign the same until sometime in the month of September, nearly five months after the contract; during all which time it remained under the control, as it yet does, of the complainant. The defendant, after having done all in his power to carry into effect the agreement soon after it was entered into, and being, as he alleges, prevented from completing the same by the delay and negligence of the complainant, was compelled to treat the contract as abandoned; and, for the purpose of effecting an actual sale of his property, he proceeded to dispose of the same at public auction. It appears that the sale was advertised publicly for three or four weeks; and notwithstanding it was notorious and well-known to every body, yet the complainant, according to his own showing, never tendered himself ready to comply with all the terms of the contract until long after the defendant had, pursuant to the public advertisement, sold and conveyed the premises to another person; nor did he even make known to the defendant that he objected to the sale until the evening of the day prior to the day of sale.

The defendants, in their answer, have relied on the delay and negligence of the complainant as exonerating them from all obligation to perform the contract. They also

insist on the subsequent proceedings in the Orphans Court as having such an effect as to prevent a decree for a specific performance. I have considered this case, and from the best reflection I have been able to bestow upon it, I cannot discover any principle arising out of the facts that will warrant a decree for a specific performance. I shall not examine the latter ground of defence, as I think the decision can be placed, with more propriety and satisfaction, upon the intrinsic merits of the case. The complainant appears to rest his right to the decree of specific performance principally upon the fact that possession was delivered. I assent to the well settled rule that the delivery of possession, pursuant to and in part execution of a parol contract for the sale of land, does take the case out of the statute; but it does not therefore follow, as a necessary consequence, that this Court will decree a specific performance.

In all contracts the time of exécution is an important consideration. When reduced to writing it is generally expressed, and if credit is to be given for the consideration money it is apparent on the face of the contract; but in parol contracts it must be, as the contract itself, the subject of parol proof in cases out of the statute.

In the contract, as stated in complainant's bill, it is not alleged that defendant agreed that complainant should have time. Hence, in the case as presented, it does appear that the defendant was entitled to the immediate transfer of the judgment and to the payment of the balance; and, from the proof in the cause, it was not the intention of the parties that the vendor should part with the possession of his land and be kept out of the value of it longer than the few days which might be necessary for the scrivener to draw the deed; nor, under the contract as stated in the bill, can it be considered that the execution of the deed was to precede the payment of the consideration money.

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But, upon this we are not left to inference or conjecture. The deed, which has been drawn by complainant and exhibited as part of his case in evidence, shows what was the understanding of the complainant himself upon this subject. In the body of it is the receipt in full for the purchase money paid; and the conveyance is expressed to be in consideration of it as paid in full. This deed also discloses another material fact, and places beyond all doubt the manner in which the rents and profits were to be subsequently adjusted and settled by the parties. The express covenant for their future payment excludes the ground assumed by the complainant, as being the cause of delay, that they were to be ascertained and deducted out of the sum stipulated to be paid as the amount of the purchase money. Taking into consideration the deed, as exhibiting in writing the complainant's understanding of the contract, it does appear to me that all the difficulty he has encountered has resulted from his own delay and negligence. But the principle upon which a court of equity proceeds in enforcing the execution of parol contracts relative to the sale of lands, in cases of part performance, is founded upon the prevention of fraud; as in cases where the vendee has entered and made improvements, or paid a considerable part of the purchase money. In the case now under consideration the vendee has not, according to his own showing, made it appear that he has sustained any injury, nor has he lost the benefit of the contract except by his own default. From what does appear it is manifest that he has derived an advantage, and that at the expense and to the detriment of the defendant. He never paid one cent of the purchase money, and yet exercised acts of ownership over the property of the defendant by cutting and using the timber thereof for his own purposes; and this when he had prevented the deed being drawn, and still held the judgment, which ought to have been assigned, under his own control and subject to attachment, or to any

other legal application thereof, in discharge of his own debts.

The rule, as laid down and acknowledged in courts of equity, is that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, there being nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the Court will not compel a specific performance. *Newland on Cont.* 242; *Sug. on Vend. 3d Lond. Ed.* 268.

In the case of *Benedict v. Lynch*, 1 *Johns. Ch. Rep.* 370, Chancellor Kent reviewed the cases as to the effect of laches of the party seeking a specific performance; and in the case before him, although the contract was in writing and the purchaser had made improvements but no payments, he dismissed the bill. The Chancellor in that case very properly remarks, with respect to the rule I have stated, that "it appears to him to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail that a party may be utterly regardless of his stipulated payments, and that a Court of Chancery will almost at any time release him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts and to the character of this Court. It would be against all my impressions of the principles of equity to help those who show no equitable title to relief." In 1 *Ves. Sr.* 450, Lord Hardwicke lays down the rule on this subject, when he says that "it is the business of this Court to relieve against lapse of time in the performance of an agreement; and especially where the non-performance has not arisen by default of the party seeking to have a specific performance." So it was held in the case

of *Hayes v. Caryll* as early as 1702; 5 *Viner, p.* 538 *pl.* 18, that where one person has trifled or shown a backwardness in performing his part of the agreement equity will not decree a specific performance in his favor, especially if circumstances are altered. The cases of *Spurrier v. Hancock* and of *Harrington v. Wheeler*, 4 *Ves. Jr.* 667–686, were on bills filed by the purchaser for a specific performance; and in the latter case he had paid part of the purchase money; but the bill, in each case, was dismissed on account of his laches and unreasonable delay. The observation of the Master of the Rolls, in *Milward v. Thanot*, 5 *Ves. Jr.* 720 *n.* is very emphatic on this subject. He observed that Lord Kenyon was the first who set himself against the idea that had prevailed, that, when an agreement was entered into, either party might come at any time; and that it was then perfectly known that a party cannot call upon a court of equity for a specific performance unless he had shown himself ready, desirous, prompt and eager. *Guest v. Homfray*, 5 *Ves. Jr.* 818, is another strong case on the point. Specific performance was refused on account of the laches of the complainant, who was the vendor. There, the purchaser had been put into possession when the contract was made; but the question was, as the Court said, whether the complainant had done enough to show that he took all the pains he could to be ready to carry the agreement into effect; and, as it did not appear that he had done all he ought to have done, though the delay was but three months and the complainant had met with an unwilling purchaser who meant to get rid of the contract if he could, the bill was dismissed.

In *Hatch v. Cobb*, 4 *Johns, Ch. Rep.* 559, the bill was for a specific performance of a contract on the part of the defendant to sell land. It appeared that the complainant had made default in the payments which, by the contract, were made a condition precedent to the conveyance; that the defendant had accepted one small payment subsequent

to such default, but that about six months thereafter defendant repeatedly called for payment and gave notice that if the complainant did not pay him he should be obliged to part with his interest in the land agreed to be conveyed. No payment being made he assigned over his right to a third person, and the complainant, with a knowledge of that fact, made a tender of the balance due on the contract and filed his bill for a specific performance of the contract, or for a compensation in damages for the payment he had already made and the improvements he had put upon the land. The complainant, subsequently to his default in payment, had confessed a judgment to a third person for $1000, to cover his property. In this case Chancellor Kent, in delivering his opinion, declares that a specific performance cannot be decreed. The defendant had fairly disabled himself before the suit was brought, and this was known to the complainant. He was not bound to wait any longer on the complainant, but had a clear right to exact immediate payment, or else to part with his interest in the land to another, in order to meet his own convenience or necessities. If the defendant had not parted with his interest before the filing of the bill, it might even then have been a point deserving of consideration whether the complainant was entitled to assistance, since no accident, mistake or fraud had intervened to prevent the performance of the contract on his part; and after indulgence and considerable subsequent delay he had twice been required to make payment and had omitted to do so. The acquiescence in his default or the waiver of it by the defendant had terminated, before the assignment, by these calls for payment. The bill was dismissed.

That the laches of the vendee will entitle the vendor to treat the contract of sale as rescinded or abandoned was decided by the case of *Ballard v. Walker*, 3 *Johns. Cases*, 60, where the vendee suffered four years to elapse before he offered to fulfill the agreement on his part, and

in the meantime the vendor had sold the land to another. The Supreme Court considered the contract of sale as rescinded or abandoned and, in an action brought by the vendee to recover damages for the non performance, gave judgment for the defendant. The cases, in which it was formerly doubted whether a court of equity could refuse to decree a specific performance on account of the laches of the party seeking it, all arose on written contract; but the decisions I have adverted to have settled the question. If these contracts in writing will not be enforced, where there has been delay or laches, there appears to be much stronger reason in whithholding the aid of this Court, under similar circumstances, when the agreement is by parol. With respect to the latter it is always the exercise of a discretionary power; and unless the equity of the complainant is clear and his conduct such as to satisfy the Court that he has fairly, punctually and fully performed, in all things, his part, he cannot be entitled to relief, and his bill must be dismissed.

It has been attempted, in the present case, to account for the delay in drawing the deed, and to prove by the testimony of one witness the assent of the defendant subsequently to the original agreement. This cannot prevail against the oath of the defendant, confirmed by the circumstances of the case and the testimony of Mr. Windsor, to the contrary; nor, if true, would it follow from thence that the vendor had agreed to the delay in payment, or to deprive himself of the use and control of the judgment which was to have been assigned or of the benefit to be derived from the payment of the purchase money. Having parted with the possession of his land, according to the terms of his contract, he was entitled to receive and enjoy its equivalent. The conduct of the complainant in so long neglecting to prepare the deed, but especially his entire neglect to pay any part of the consideration, while according to his own allegation he was deriving advan-

tages from the use and possession of the defendant's property, all concur in satisfying me that the non performance of the alleged contract resulted from the neglect and delay of the complainant; and this, under the circumstances of the case, appears to me to have authorized the defendant to treat the contract as abandoned, and to adopt the course he did for the purpose of effecting a sale of his property. The complainant's bill must, therefore, be dismissed with costs.

THE STATE OF DELAWARE,

vs.

THE WILMINGTON BRIDGE COMPANY.

New Castle, Sept. T. 1838.

The charter of the Wilmington Bridge Company provided that any excess of tolls received by the company over ten per cent. of its capital stock should be paid over to the trustee of the school fund for the use of the fund. The Company were directed to give notice to the trustee of the accruing of such excess, and the trustee was authorized to sue for the same at law. *Held* that, notwithstanding a remedy at law was given by suit in the name of the trustee, a bill in equity would lie in the name of the State against the company for a discovery, account and payment.

BILL IN EQUITY AGAINST A CORPORATION FOR AN ACCOUNT AND FOR PAYMENT OF AN EXCESS OF TOLLS DUE TO THE STATE UNDER ITS CHARTER.—Under the provisions of the Act of the General Assembly incorporating the Wilmington Bridge Company the State of Delaware reserved to itself

any excess of tolls to be received by the company over ten per cent. of its capital stock, and directed that such excess should be paid over to the Trustee of the School Fund, for the use and benefit of that fund. It was made the duty of the company to give notice to the Trustee of any such excess, as the same should from time to time accrue, and also to afford to the Trustee access to the books of the corporation, when thereunto required, in order to ascertain whether at any time such excess of tolls had accrued. A right of action at law to recover the excess was given by the charter to the Trustee. The present bill was filed by the Attorney General, under the direction of a joint resolution of the legislature. It alleged that tolls had accrued and been collected by the Bridge Company, to an amount exceeding the 10 per cent. upon its capital; of which excess the company had neglected to give notice; and also that it had refused to pay over the same to the Trustee of the School Fund, pursuant to the directions of its charter. The bill, therefore, prayed a decree for an account of the tolls collected since the year 1807, the date of the charter, and for the payment of any such excess.

The defendant demurred to the bill, and the cause came before the Chancellor, at the September Term 1838, for a hearing upon the demurrer.

J. A. Bayard and *J. Wales*, for the defendant, in support of the demurrer.

The charter of this corporation provides an action at law by the Trustee, as the remedy for the recovery of any excess of tolls received by it. The charter is a contract between the State and the company; and the joint resolution of the legislature, directing a different remedy from that provided for in the charter, is a violation of the contract and in conflict with the Constitution of the United

States. 1 *Black. Com.* 468; 9 *Mod. Rep.* 409; 1 *V. & B.* 226; 2 *Johns. Ch. Rep.* 384; 4 *Wheat. S. C. Rep.* 676. The remedy of the State is by an action at law.

W. H. Rogers, (representing the Attorney General,) for the State.

The resolution of the legislature gives no new right nor remedy, but only directs that a remedy already existing may be adopted. This Court, by virtue of its general jurisdiction for discovery and account, may entertain this bill; and, as a relief incidental to discovery and account, the Court may decree payment. Such jurisdiction is not affected by the provision of the charter, giving a remedy by action at law. The corporation is subject to the general jurisdiction of the Court and to all such remedies as are applicable to the rights and obligations arising under its charter.

JOHNS, JR., CHANCELLOR.—I am of opinion that this Court has jurisdiction. The charter is the contract between the company and the State. It was accepted with the liability to account for excess of profits over the ten per cent. The direction to pay the same to the Trustee of the School Fund was nothing more than the designation and appointment of a person to receive it; and the remedy which he was authorized to adopt applied to the recovery of the excess when it occurred, of which it was the duty of the corporation to apprise the Trustee. The further power of inspecting the books could only be exercised for the benefit and information of the party to whom the excess over the ten per cent. belonged. It could not have been designed to impair or take away the right of the party beneficially entitled to adopt the usual remedies, either to enforce an account or compel payment.

Under this charter there can be no question that the

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State was entitled to have the excess of profits over ten per cent. paid to its agent; but whether such excess had occurred could only be made to appear by an account of the pecuniary transactions and affairs of the company, if they have omitted to comply with the stipulation on their part. To deprive the State of the only mode of compelling an account would be to impair the interest of the State under this contract. It is true, as has been argued, that there is an action at law given by the charter to the trustee. But that does not afford a complete remedy where, as in this case, a discovery and an account are necessary in order to ascertain whether any and what excess of tolls may have accrued. It is a case of concurrent remedies applying to the same subject matter, but for different purposes; and for the purpose of this bill the remedy at law would be ineffectual.

The demurrer is overruled and the defendant ordered to answer over.

JOHN T. KILBY, Administrator of SOPHIA LAWRENCE, deceased, and JOHN S. LAWRENCE,

vs.

JOHN GODWIN AND JOHN BULLOCK.

New Castle, Sept. T. 1838.

A post nuptial agreement that the wife shall enjoy, for her sole and separate use, property to which the husband has become entitled in her right, if upon sufficient consideration and not in fraud of creditors, will be enforced in equity.

Statement of the case.

Pending a suit in equity by the wife against her husband for enforcing an ante nuptial contract, it was agreed by the husband, as a compromise of the suit and in consideration of its dismissal, with the wife's consent, that one half part of certain funds held by him, in her right, should be for her sole and separate use; and such half part was, pursuant to the agreement, delivered to the wife's solicitor and came to her possession and was afterward, during her last sickness, disposed of by her as a *donatio causa mortis*—*Held*, that the agreement was valid; and that the funds delivered, in pursuance of it, became the wife's separate property, and passed by her disposal of them as a *donatio causa mortis*.

A *donatio causa mortis* defined. An actual delivery of the property essential; but this may be made to a third person for the use of the donee.

A mother, in her last sickness, holding certain securities for her separate use, delivered the same, together with some articles of personal use, such as a watch and jewelry, to a third person, declaring them to be for the benefit of her two minor children; and, with the securities and articles, also delivered an inventory of the same. She died in a few days afterward—*Held*, a valid *donatio causa mortis*.

BILL IN EQUITY AGAINST A TRUSTEE FOR AN ACCOUNT AND FOR THE DELIVERY OF SECURITIES RECEIVED FOR COMPLAINANTS AS A DONATIO CAUSA MORTIS.—The bill alleged that Sophia S. P. Lawrence, now deceased, in her lifetime intermarried with the defendant, John Godwin; that, by an ante nuptial contract, the property held by Mrs. Godwin before the marriage was secured to her sole and separate use; that, after the marriage, the contract came to the possession of the husband and was destroyed by him; that subsequently he received from the Executor of a former husband of Mrs. Godwin certain funds, to which she was entitled as widow of her deceased husband; that a bill in equity was filed in the State of Virginia, where the parties then resided, in order to enforce the provisions of the marriage contract; which proceeding was compromised and the bill dismissed, pursuant to an agreement between the parties whereby the husband, Godwin, consented to the wife's separation from him, and that one half of the money and securities derived from the estate of Mrs. Godwin's former husband should be for her separate use; and one

Statement of the case.

half the same was for that purpose left in the hands of Richard Baker, her solicitor in the suit in Virginia. That afterward Mrs. Godwin removed with her two children by a former husband, viz. Sophia A. Lawrence and John S. Lawrence to Wilmington, in the State of Delaware, where she died in October, 1833; that during her last sickness, and while in expectation of her death, she caused an inventory of the securities held for her use as aforesaid to be made and delivered to the defendant, John Bullock, together with the securities themselves, and also some personal chattels such as a gold watch, jewelry &c. It was alleged that such delivery was made to John Bullock for the use of her two children, and as a *donatio causa mortis*, and that Mrs. Godwin died without recovering from her said sickness. The bill further alleged that John Bullock became the administrator of Mrs. Godwin, and that John Godwin had given him notice not to pay over the funds in his hands to Mrs. Godwin's children, claiming to be entitled to them himself. This bill was, therefore, filed by the administrator of the daughter, Sophia A. Lawrence, she being deceased, and by the son, John S. Lawrence. *Prayer*, that Bullock may account for the funds delivered to him by Mrs. Godwin in her last sickness, and that they may be paid over to the complainants.

The defendant, Godwin, by his answer* admits the marriage, and that prior to the marriage he agreed to enter into a stipulation in writing, that the property of his intended wife should not be liable for his debts; that such a writing was executed and placed in the hands of one William Scott, who after the marriage brought it to the defendant; but the defendant does not recollect whether he took it, or left it to remain with Scott. He admits the allegation of the bill touching the suit in chancery on the

* The answer of the other defendant, Bullock, is not set forth in the Chancellor's notes, and could not be found among the papers filed in the cause.

part of the wife in Virginia and the compromise and dismissal of the bill, and that he did agree to place certain funds, which had come to him in her right, in the hands of Richard Baker, who was to collect and apply the same to her use, as she should need. The defence made by the answer was, that the transfer of securities, under the compromise of the Virginia suit, to the solicitor of defendant's wife was not an assignment, but a provision for her support while living, such as not to affect the husband's title. The answer also denied that there was a sufficient *donatio causa mortis.*

The cause was put at issue and a rule for commissions entered. Depositions were taken, proving the execution of the marriage contract as alleged in the bill, and the contents thereof, to the effect that Godwin, the intended husband, should not receive any of the intended wife's property, without her consent, and that it should not be liable for his debts. It was also proved that Godwin had stated that the contract was illegally executed, and that he had destroyed it; also that he had received from the estate of his wife's deceased husband funds to the amount of $4000, which the administrator, Robert White, testified to having paid over to Godwin, in ignorance that a marriage contract had been entered into. Depositions were also read to prove that Mrs. Godwin, in her last sickness, at Wilmington, Delaware, and in view of her approaching death, sent for the defendant, John Bullock, and delivered to him the securities which she had received for her separate use under the compromise of the suit in Virginia, together with some articles of personal use, such as her watch and jewelry; and such delivery was expressed by her to be for the benefit of her two children, who were minors; that an inventory of the property delivered was made and compared with it by a witness to the transaction, Caleb P. Bennett; and the same was handed, with the property, to

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Bullock. That Mrs. Godwin never recovered from her sickness, but died in a few days after.

The cause came before the Chancellor, at the September T. 1838, upon the bill, answers, exhibits and depositions.

J. A. Bayard, for the complainants.

The proof shows, beyond controversy, that there was a marriage contract, and that Mrs. Godwin held the property in question to her sole and separate use. If so, she had the absolute right to dispose of it; and her disposal of it as a *donatio causa mortis* was valid, and entitles the complainants. The delivery of the property to the defendant, Bullock, under the circumstances proved, was a clear case of a *donatio causa mortis*. 1 *Wms. on Exr's*, 650.

R. H. Bayard, for the defendant, Godwin.

The evidence as to the contents of the marriage contract does not prove that the intended wife's property was to be for her separate use, so as to be subject to her control and disposal, but only that it should not be subject to her husband's debts. Beyond this it remained his property, as a gift by the marriage, and was subject to his sole control. Then, with respect to the claim that the wife became entitled to her property, under the compromise of the Virginia suit, there was no valid transfer of it for the sole use of the wife. It was suffered to remain in the hands of her solicitor, Baker, to meet her necessities; but there was no assignment, and the husband never parted with the dominion over it. 1 *Ves. Jr.* 46, 49. *Clancy on Mar. Wom.* 259, 260. 2 *Kent. Com.* 439. Further, there was no *donatio causa mortis*. Such a disposal is contrary to the purpose of our Act respecting nuncupative wills, which prescribes

the only mode in this State for the disposal of personal property, otherwise than by will, to take effect after the death of the owner. *Dig. Del. Laws*, 557.

J. A. Bayard, in reply.

Our Act of Assembly respecting nuncupative wills does not touch the case of a *donatio causa mortis*. The essential difference between the two is that in the latter there is a delivery. Our case rests upon the proof of that fact.

JOHNS, JR., CHANCELLOR.—In this case, it appears that, pending a suit between husband and wife, instituted by her next friend in the Court of Chancery in Virginia, to enforce a contract alleged to have been made prior to marriage and which had been, after the marriage, destroyed without her consent, the husband and wife compromised the matter in controversy; the suit was dismissed; and, from the testimony of the solicitor who filed the bill and had charge of the business, it appears that bonds and other securities, which had constituted part of the wife's personal property under the will of her former husband, were, by the executors of the wife's former husband,delivered to Mr. Baker for collection; and the money, deducting charges, was to be remitted to Mrs. Godwin, with the assent and direction of the husband. It also appears that, after this compromise, the wife left the husband, and removed to the city of Wilmington, in the State of Delaware, where her two children by a former husband were at school, and refused to return or again cohabit with her husband. The deposition of the witness further establishes the fact that, according to the instructions and in pursuance of the agreement on the part of the husband, Mr. Baker collected and transmitted to Mrs. Godwin sundry sums recovered by him, which, remaining in her hands, she used as her own separate property, acquired

under the agreement of compromise and in part execution of the same. The personal property thus in her possession, in her last sickness, she delivered to Mr. Bullock, one of the present defendants, for the use of her two children. Letters of administration, after the death of Mrs. Godwin, were granted to Mr. Bullock, who has now the possession of the property. He has received notice from Godwin of his claim, and has been prohibited by him from paying over the same to the two children of the deceased. The administrator of Sophia A. Lawrence deceased, and John S. Lawrence, by his next friend, have filed their bill, and pray that their right to the same may be established and decreed, they claiming the same as a *donatio causa mortis* from their late mother, made by her to them of her separate personal property.

The agreement, so far as the property and money now in controversy is concerned, if valid, was executed. It is not alleged that there was any agreement in writing; but as the testimony establishes the fact that there was an agreement and a consideration for the same, *i. e.* the compromise and dismissal of the suit in equity, the decision of this cause necessarily requires that the preliminary questions as to the validity of this agreement, and the condition of the property or money sent to Mrs. Godwin by Baker under and in part execution of the same, be first considered.

In *Rutland v. Mollineaux*, 2 *Vernon* 64, a *feme covert* had agreed to sell her inheritance; so as she might have £200 of the money secured to her. The land was sold, and the money put out in a trustee's name accordingly. The bill was brought by a creditor of the husband to subject this money to the payment of his debt, and charged that the wife promised and agreed it should be liable thereto. The Court say; " this money shall not be liable to the payment of the husband's debts, nor shall any promise made by the

wife for that purpose, subsequent to the first original agreement, be obligatory on that behalf." In *Slanning et al. vs. Style*, 3 *P. Wms.* 337, it was contended, that there was no decree, nor any writing whatsoever, whereby to raise a separate property in a *feme covert*, which was what the law did not favor; that it was no more than a connivance or permission that the wife should take these things and continue to enjoy them during the husband's pleasure, which pleasure was determined by his death : besides, this agreement being after marriage was but a voluntary one, for which a court of equity usually leaves the party to take his remedy at law ; and that in truth the husband borrowing this £100 of his wife was no more than borrowing his own money. But the Lord Chancellor Talbot decreed that the wife was well entitled to come in for this £100, as a creditor before the Master ; observing that " the courts of equity have taken notice of and allowed *feme coverts* to have separate interests by their husbands' agreement, and this £100 being the wife's savings, and there being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality ; and such agreement would be of little avail were it to determine by the husband's death ; that it was the strongest proof of the husband's consent that the wife should have a separate property in the money arising by these savings, in that he had applied to her and prevailed with her to lend him this sum ; in which case, he did not lay claim to it as his own, but submitted to borrow it as her money. Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered that the wife should be allowed to come in for this £100, as a creditor before the Master ; and the Court cited the case of *Calmady v. Calmady*, where there was the like agreement made between the husband and the wife, that upon every renewal of a lease by the husband two guineas should be paid by the tenant to the wife ; and this was allowed to be her separate money."

Opinion :—wife's title—*donatio causa mortis.*

The cases referred to do not appear to present as strong grounds of equity for relief as are exhibited in the one now under consideration.

The conduct of the husband in relation to the contract which the wife supposed was executed before marriage, his depriving her of the benefits of that contract, and afterward, when by her next friend she had instituted proceedings in equity to establish the contract, entering into an agreement and obtaining the dismissal of the suit and, in consequence thereof, acquiring the one-half of the unpaid balance of his wife's personal property—these circumstances, in connection with the situation of the wife, who, subsequent to the said agreement, left the husband and removed from Virginia to the State of Delaware, and never again cohabited, but lived separate from him, all concur in inducing me to consider the property which is the subject of the present suit as having been, in the lifetime of the wife, in her possession as her separate property, delivered to her in pursuance and in part execution of the agreement of compromise, as an equivalent and substitute for what she was seeking under the suit in equity.

The only question remaining to be considered is whether, being thus possessed of the property, she died intestate as to it, or disposed of it in her lifetime as a *donatio causa mortis.* If it was intestate property I have no doubt it would belong to the husband as personal property under the Act of Assembly.

A *donatio causa mortis* is where a person delivers, or causes to be delivered, to another the possession of any personal effects, to keep in case of the donor's death. An actual delivery of the thing given is the essential requisite to this species of legacy. The possession must be transferred in point of fact. If the delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio causa mortis.*

Opinion:—*donatio causa mortis.*

A ring, a purse of gold, and such like articles that are capable of being delivered, will, when delivered, be good as a *donatio causa mortis.* But where a man on his deathbed gave his wife his coach and a pair of his coach horses, bidding three witnesses to take notice of it, who accordingly made a memorandum thereof in writing, it was held that this was no valid gift, there having been no delivery. 3 *P. Wms.* 356.

In the case before me, by the testimony of Mr. Bullock it appears that Sophia S. P. Godwin sent for him during her last illness and stated to him that she had property in her possession and, as she did not expect to recover from her then illness, she desired him to take charge of it for the benefit of her children, Sophia A. Lawrence and John S. Lawrence; and proposed having an article of trust executed for that purpose, which he declined. She then insisted on his taking charge of the property, for safe keeping, for her two children. The property consisted of a gold watch, some articles of jewelry, notes of different banks, and some gold coins. An inventory of them was taken on the 22d of November, 1823; and they were handed to Caleb P. Bennet, who examined and compared them with the inventory, signed it with his proper signature and handed the property and inventory to Mr. Bullock. The witness further states that Sophia S. P. Godwin was then ill and confined to her bed, from whence she never arose, but died in a few days after; that she made the disposition of her property in the full expectation of approaching dissolution, and frequently observed to Mr. Bullock that the property was her own *bona fide* property, and that she possessed the right to dispose of it, independently of any other person.

In this case it is apparent that the property was delivered to Bullock for the use of the children. In *Wells, Admr. of Craig v. Tucker and wife*, 3 *Binney's Reps.* 366, the Court decided that the delivery of a bond or personal chattel by

Opinion :—conclusion.

the owner in his last illness to his wife, for the use of a third person, is a sufficient delivery to make it a good *donatio causa mortis.* In *Bunn et al. vs. Markham et al.* 7 *Taunt.* 224 (2 *E. C. L.* 81) Burroughs J. at the conclusion of his opinion, remarks "In Burns' Ecclesiastical law all the cases are collected; they all indicate that there must be a delivery, either to the donee himself or to some one else for the donee's use. In *Drury v. Smith*, 1 *P Wms.* 405, referred to in the case of *Wells v. Tucker*, it is said; ".the gift was supported, though to a third person for the use of an absent donee."

Under these decisions I am satisfied upon the point of delivery; and am, therefore, of opinion that the complainant's claim is well founded, and that the personal property delivered into the hands of Mr. Bullock, for the use of the children of Mrs. Godwin, in her last sickness, belongs to them as a *donatio causa mortis.* But, as the bill filed in this cause does not state the amount claimed, and regards the defendant Bullock as having the property in trust under the gift, and prays for an account, I must make an interlocutory decree, ordering Mr. Bullock to file an account, on oath, of the articles and money delivered to him by Mrs. Godwin.

Decree accordingly.

Statement of the case.

SAMUEL COMLY,

vs.

JOHN WATERS, THOMAS LAIRD, MICHAEL MCMAKIN, ROBERT BURGESS AND DENNIS KELLY.

New Castle, Feb. T. 1840.

An inquiry, whether there was any and what consideration existing at the time of the execution of a certain writing obligatory, does not present a sufficiently distinct fact to be the subject of an issue out of Chancery, for trial by a jury.

The Chancellor will not, upon application, order issues for trial by a jury respecting facts not material in his judgment, to a decree in the cause.

A debtor in failing circumstances gave his bond to one creditor to secure a debt due to such creditor, and as to the balance under a parol trust to pay certain other creditors, per schedule. *Held*, void as to the other creditors, who were not named in the bond and with whom there was no communication.

Such a transaction does not create a trust in favor of the creditors. The bond is revocable at the will of the obligor; and it is prohibited by the Statute of Frauds.

A bond given by a debtor in failing circumstances, covering all his property for the benefit of preferred creditors, is contrary to the policy of the Statute against fraudulent insolvency.

BILL IN EQUITY.—The case made by the bill was as follows:—The defendants, Waters and Laird, together with one Moses Redpath, were engaged in the manufacture of cotton goods on the Brandywine, prior and up to the year 1837, when they failed in business. Before their failure the complainant, a commission merchant in the city of Philadelphia, had been their agent for the sale of goods, and had from time to time advanced considerable sums of money and incurred responsibilities for them, which at the date of the failure amounted, with interest, to $65,922.05.

Statement of the case.

Previously to the accruing of this large indebtedness, to wit, on the 21st of February, 1834, the complainant had taken the bond of Waters, Laird and Redpath, with a warrant of attorney for the confession of judgment, conditioned for the payment of the real debt of $15,000, and with an agreement thereon indorsed, under which the bond, and any judgment to be entered thereon, were to stand as a security for such sums as should at any time be due to the complainant for advances to be made to the obligors or responsibilities to be incurred for them. On the 20th of November, 1838, judgment was entered upon the bond and a *fieri facias* for $18,000 was issued and returned to the May Term 1838, as levied upon certain goods, chattels and machinery of the defendants in the execution. The goods levied upon were subject to a prior levy, made under a *fieri facias* returnable to the May Term, 1837, issued upon a judgment which had been entered (April 20th, 1836,) on a bond given by Waters, Laird and Redpath to the other defendants, McMakin, Burgess and Kelly, for $18,690.63. The goods were afterward sold under this execution for $16,659.06.

The bill alleged the above stated facts, and charged that the bond to McMakin, Burgess and Kelly was without any consideration beyond the sum of $400, which was due from the obligors to Kelly, one of the obligees; and the complainant claimed, as applicable to his execution, the whole proceeds of the goods except the said sum of $400 due to the defendant Kelly and $2000 in arrear for rent of the premises occupied by the debtors in the execution at the time of the levy.

The answer of Waters and Laird admitted that in the Spring of 1821 they, together with Redpath, became partners in the cotton spinning business on the Brandywine; that they executed a bond to the complainant under the circumstances and for the amount alleged in the bill. It

Statement of the case.

alleged that they were not, at the date of the bond, indebted to the complainant, but that the bond was given to secure the complainant for future advances and responsibilities; that at the time of their failure they were not indebted to the complainant upon full settlement, in more than $15,000; that their original partnership expired in 1836, after which the business was carried on by Waters and Laird, as partners. These defendants further admitted the execution of the bond to McMakin, Burgess and Kelly, as alleged in the bill, and that there was, at the giving of said bond, no indebtedness from them to the obligees therein except in the sum of $400 to Kelly; but they alleged that, with respect to the excess of the bond above the $400 due to Kelly, it was given under a parol agreement between the parties to the bond that such excess was to be for the benefit of certain other creditors of Waters and Laird, of whose debts and the several amounts thereof a written schedule was annexed to the bond. The complainant, Comly, was not among the scheduled creditors.

The answer of McMakin, Burgess and Kelly admitted the facts in the bill alleged, so far as concerned their own transactions; and it also set forth the consideration of the bond given to them by Waters and Laird, in substantially the same manner as did the answer of those defendants.

It was not alleged, in either of the answers, that the scheduled creditors, or any of them, were parties or privies to the agreement under which the bond to McMakin, Burgess and Kelly was given; nor was there any proof to that effect.

The cause came before the Chancellor, at the February Term 1840, for a hearing upon the bill, answers, exhibits and depositions.

W. H. Rogers, for the complainant.

J. A. Bayard and *J. Booth*, for the defendants.

Motion for issues.—opinion.

The case was opened by the reading of the bill and answers, and also of the exhibits and depositions on the part of the complainant. At this stage of the proceedings the solicitors for the defendants moved the Chancellor to order that certain issues of fact arising in the cause be tried by a jury at the bar of the Superior Court. The issues so applied for were as follows; viz:

1st. Whether there was any and what consideration existing at the time of the execution of the writing obligatory, in the pleadings mentioned, by the said John Waters and Thomas Laird to the said Michael McMakin, Dennis Kelly and Robert Burgess?

2d. Whether the debts mentioned in the schedule annexed to the defendants' answer constituted the consideration of the said writing obligatory; and whether the said debts were *bona fide* due and owing by the said John Waters and Thomas Laird?

3d. Whether the partnership existing between Thomas Laird, John Waters and Moses Redpath was dissolved, and at what time the same was dissolved?

4th. Whether the interest of Moses Redpath in the property of the said firm of Waters, Laird and Redpath was sold and assigned at any, and what time, and for what consideration, to Thomas Laird and John Waters, or either of them?

JOHNS, JR., CHANCELLOR.—The application I consider as made in time; but while I recognize the right of the party to have an issue upon matters of fact arising out of the case at the hearing, I must confine the exercise of the right to facts, and cannot extend it, so as to constitute the jury an organ of inquiry to ascertain whether any and what consideration existed. Hence, upon the first proposition, as it alleges no distinct fact, I cannot order an issue upon it.

Motion for issues—opinion.

With respect to the second proposition—as to the existence of the debts as set forth in the schedule, and whether they constitute a part of the consideration of the said writing obligatory—I am inclined to the opinion that the proposed inquiry does not present such a fact or facts as were intended to be embraced by the legislative provision.

The fact or facts must be such as would, when established, be available in supporting a consideration, so as to establish the indebtedness of Waters and Laird to the execution creditor; and this cannot depend on their indebtedness to third persons; nor could such a fact, if established, have any effect upon the amount of their indebtedness to the defendants, McMakin, Burgess and Kelly. If suit were pending at law upon the written instrument, and the question of consideration were open, it could not be allowed the party to establish the fact of indebtedness to him by evidence showing that Waters and Laird were also indebted to fifty other persons; nor could a judgment at law have been obtained on the writing obligatory by suit, so as to secure or authorize the recovery by execution of any sum beyond what was actually the real debt from Laird and Waters to the present defendants, McMakin, Burgess and Kelly. Hence, the second proposition does appear to me, in reference to the matter and cause to be heard and determined in this Court, to be altogether immaterial; as the same matter, if it could be tendered as an issue at law, would be an immaterial issue.

The same remark appears to me equally applicable to the third and fourth propositions. They relate to facts which I do not consider I am called upon in this cause to determine, and are therefore unnecessary to be ascertained by a jury.

Upon the refusal of the Chancellor to direct the trial of issues of fact, the hearing of the cause proceeded; the ex-

hibits and depositions on the part of the defendants being read and the cause argued by the solicitors of the respective parties.

JOHNS, JR., CHANCELLOR.—In this case the complainant charges, by his bill, that the judgment on which the defendants' execution issued, to levy and collect $18,000, was without consideration, except or beyond the sum of $400; that being the whole amount of debt due from the firm of Laird and Waters to one of the other defendants.

The answer admits that no more than $400 was due, as stated in the bill of complaint; but it insists that the excess was, by a parol agreement between the obligor and obligee in the bond, intended to secure certain other creditors of Laird and Waters, according to the schedule showing their names and the amount respectively due them, allowing only fifty per cent. to be applied to a specific sum due from Laird and Waters as indorsers of notes given to Comly, the complainant. The answer further admits their indebtedness to the complainant, who is a judgment and execution creditor, to the amount of about $15,000. It is not alleged in the answer, that the scheduled creditors were either parties or privies to the bond, judgment or execution. The only question necessary to be considered and decided in this case is the right of the defendants, McMakin, Burgess and Kelly as execution creditors. It is manifest and admitted that there is no indebtedness, except to one, that is, Kelly, and that no more is due to him than $400. Can the execution be available to collect more than the debt due to the creditor who is a party and privy? or, can the excess beyond the debt due to the obligee be collected and legally held under the execution for the benefit of other creditors of the obligor, who are neither parties nor privies to the bond, judgment or execution? Unless their debts can be incorporated into the

consideration of the bond, (supposing the transaction to be without the other ingredient, which shows that the obligors apprehending insolvency resorted to this as a mode of preferring their scheduled creditors,) it must necessarily follow that the persons named in the bond as obligees, and who at law stand on the record as the judgment and execution creditors, their debt being paid, could not hold the surplus as belonging to them. It would, by the process of law, supposing the Sheriff to have paid the whole amount over into the hands of McMakin, Burgess and Kelly under the execution, have no greater force or effect than would take place if the firm of Laird and Waters had delivered over to McMakin, Burgess, and Kelly a similar amount in cash, directing them to pay certain creditors. In such a case, until the agent actually applies the fund, there is no payment; and if the agent or depositary should misapply the fund or waste or lose the same it would not affect the right of the unpaid creditors; nor would the delivery by the debtor to his own selected and appointed agent prevent the creditors from suing and collecting their debts from the debtor. This being so, it must be admitted that as to a fund thus placed in the hands of a stranger, to be applied in the payment of debts, whether it be so done either by actual delivery over by the debtor or by means of a bond, judgment and execution, which authorizes under legal proceedings the acquisition of the fund, the result is precisely the same in all cases in which the creditors are not parties and privies to the transaction. With respect to the contract authorizing the agent or depositary to collect or obtain possession of the fund, if the creditors be not parties or privies, I cannot perceive how their debts can possibly constitute the consideration of the contract. The right of property still remains in the debtor, and he remains liable to all risk; and hence he retains the control and the power of revocation. If it is asked who is, under such circumstances, the *cestui*

Opinion :—trust for creditors void for want of privity.

que trust, it can be none other than he who has the beneficial interest in the fund. Hence, under the circumstances I have supposed, where the creditors are neither parties nor privies, that person must be the owner of the fund who either delivered it over or authorized the person to whom it was not owing to use legal process to obtain the possession. Being the person retaining the right of property, the legal possession of which is in another, he must be the person beneficially interested, and consequently the *cestui que trust.*

That this is the true relation of the parties in such a transaction is now settled by the modern decisions relative to assignments to pay creditors, not parties and privies, but enumerated in a schedule, or where they are named as parties but they are not privies. In such cases it is held that the assignment is voluntary and that the creditor's debts constitute no part of the consideration. Formerly, it was considered that they constituted a meritorious consideration. In a case before Lord Keeper Bridgman it was doubted whether a conveyance for payment of debts, made voluntarily and no creditors named in the deed, was revocable by the grantor; and the Court, with the assistance of the judges, was clearly of opinion that the deed was founded on a just and honest consideration, and that the creditors were *cestuis que trust* and might compel the execution. 1 *Chan. Rep.* 30; 1 *Ch. Ca.* 249. But in a case before Lord Eldon, where the creditors were scheduled to the deed, though neither parties nor privies to it, the instrument was held to be revocable. 3 *Mer. R.* 707; 3 *Sim. R.* 1. And so it was determined in a more recent case, where the creditors were parties to the deed but not privies to it. 3 *Sim. R.* 1; 2. *M. & K.* 492; 4 *Russ R.* 24. And the principle upon which the modern doctrine proceeds is reasonable enough; "for where," observed Sir L. Shadwell, "a person without the privity of any one, without receiving

Opinion :—trust for creditors void for want of privity.

consideration, and without notice to any creditor, makes a disposition, as between himself and trustees, for payment of debts, he is merely directing the mode in which his own property shall be applied, for his own benefit; and the general creditors named in the schedule are merely persons named there for the purpose of showing how the trust property shall be applied." 3 *Sim. R.* 12. "The deed merely operates," said Sir J. Leach, "as a power to the trustees, which is revocable by the debtor; and it has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment made by the agent or communication by him to the creditors had recalled the money so delivered. *Acton vs. Woodgate*, 2 *M. & K.* 495. And the present Lord Chancellor, when Master of the Rolls, in the case of *Bill vs. Cureton*, 2 *M. & K.* 511, observed that, according to *Walwyn vs. Coutts*, and *Garrard vs. Lord Lauderdale*, the character of trustee and *cestui que trust* never existed between the creditor and the trustees; for the settlor himself was the only *cesui que trust;* and, therefore, he was entitled to direct the application of the trust fund. The rule is adopted to promote the views and intentions of the parties. A man who, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself, and not to his creditors. It would be a result most remote from the contemplation of the debtor, if it should be held that any creditor, discovering the transaction, should be able to fasten upon the property and invest himself with the character of *cestui que trust.* The case of *Garrard vs. Lord Lauderdale* involved the additional circumstance of a subsequent communication from the trustees to the creditors of the contents of the trust deed; but the Court was of opinion, as appears right upon principle, that the revocable nature of the instrument was not thereby destroyed. 3 *Sim. R.* 12.

Considering the judgment and execution held by the

Opinion :—trust for creditors void under insolvent law.

present defendant as having accomplished all it was intended to effect, it could do no more than occasion a transmutation of the possession of the property, without affecting the right of property in the surplus, over and above the amount of $400, due to one of the defendants. The surplus in their hands must necessarily belong to Waters and Laird until actually applied in payment. The question occurs, what is to direct and control this payment? The answer alleges the parol agreement, in connection with the schedule annexed; but, independent of the objection to the transaction arising out of the circumstance of the other creditors not being parties or privies, it does appear to me impossible that the parol agreement can, under the circumstances of this case, be allowed to have any effect. Had it been in writing it could not avail without expressly violating the law of this State relative to cases of this character, when the debtor, apprehensive of utter ruin and insolvency, attempts, either by parol or writing, to direct the appropriation of his property, not for the equal benefit of all his creditors but for the avowed purpose of prejudicing the rights of one, and by the schedule annexed giving a preference. If such a transaction should be permitted to stand, or be entertained by a court of equity, it would altogether defeat the object intended to be effected by the law of this State, which declares, that "if any person or persons, in contemplation of insolvency, or in contemplation of taking the benefit of the insolvent laws of this State, make an assignment of his, her or their estate or effects, for the benefit of his, her or their creditors, and in or by such assignment, either under the provisions thereof or otherwise, shall prefer any one or more creditor or creditors to another or others, or shall, in or by such assignment, secure or pay to any one or more creditor or creditors a greater proportion of his or her debt or demand, than shall be secured or paid to each and every the creditor and creditors of the person or persons making

such assignment, every such assignment, so preferring one or more creditor or creditors to another creditor or other creditors, shall be deemed fraudulent and absolutely void."

It is manifest that this act was passed, not to prevent assignments but to prevent persons, in contemplation of insolvency, either by assignment or otherwise, doing any act to prefer creditors, or through the intervention of a trust so to appropriate their property as to effect an unequal distribution thereof.

The present case I consider an attempt to evade the provisions and counteract the whole object and policy of the act; and, therefore, so far as the judgment and execution have been used for the purpose of obtaining the fund to be distributed, as directed by the obligor, in such manner as to give a preference, whether the directions be verbal or in writing, in either case I consider the transaction within the provisions of the act and *pro tanto* fraudulent and void.

I am, therefore, of opinion that the defendants, McMakin, Burgess and Kelley, are not entitled to recover, under the execution, a sum beyond the amount due to Kelley, one of the obligees, which by the bill is stated to be $400, and by the answer admitted as the only amount due.

It is, therefore, ordered by the Chancellor that a perpetual injunction issue, enjoining and restraining the defendants from receiving, under the said judgment or execution, any further sum than the $400, due to the defendant Kelly, with interest thereon, and the costs accrued upon the judgment and execution; the costs in this cause to be paid by defendants.

Decree affirmed by the Court of Errors and Appeals, at the June T. 1840. 3 *Harring. R.* 117.

Statement of the case.

CHRISTOPHER BROOKS, ADMINISTRATOR OF ELIZABETH C. BRADFORD, DECEASED, MARY OLIVER, ET AL.,

vs.

ABRAHAM EGBERT.

New Castle, Feb. T. 1840.

A voluntary trustee, without contract for compensation, is not entitled to it in equity; though he will be allowed his expenses and saved from loss.

BILL AGAINST TRUSTEE FOR ACCOUNT—COMPENSATION.—Mary Oliver, one of the complainants, having a judgment against James Bradford for $2,191.41, assigned it to the defendant *in trust* for Bradford's wife, Elizabeth C. Bradford, (who was sister of the complainant, Mary Oliver,) for her separate use during her lifetime, and after her death for her children. The trustee received under this judgment, from time to time, large sums of money, and disbursed the same, or part thereof, according to the trusts of the assignment; but, having been involved in several lawsuits in defence of the judgment, which was attacked by other creditors of James Bradford as being without consideration, and having incurred great trouble and expense in the premises, the trustee claimed to be allowed therefor out of the fund.

The bill was filed by Mary Oliver, by Christopher Brooks, Administrator of Elizabeth C. Bradford, now deceased, and by her children, for an account of the trust fund. The only issue raised by the answer was upon the claim for an allowance to the trustee.

A declaration of trust had been executed by the trustee, which, being lost at the time of filing the bill, was not set

Argument.

forth. The declaration being afterward found, it was made part of the case by a supplemental bill. It recited the assignment of the judgment, and declared that it was made "for the express purpose of its proceeds being applied unto Elizabeth Bradford, and after her decease to her children;" and it covenanted, on the part of the trustee, that he "would use his endeavors to apply all the aforesaid monies that might come into his possession for the true intent and meaning of the said assignment, and to account for the same as it might come to his hands, and, if possible, to be applied in the purchase of part of the farm of James Bradford, which will soon be sold on account of certain judgments."

The cause came before the Chancellor, at the Feb T. 1840, for a hearing upon the bill, answer and exhibits.

J. Wales, for the complainant.

The office of a voluntary trustee is wholly honorary; and it is fully settled that he is entitled to no compensation, in the absence of a stipulation for its allowance. *Green vs. Winter*, 1 *John. Ch. Rep.* 39; *Manning vs. Manning*, *ib.* 527. The proof of extraordinary trouble to the trustee in this case is unsatisfactory; but were it otherwise, that forms no ground for an exception to the rule. The trustee, having voluntarily undertaken the trust, must accept it with all its incidents and perform it.

G. B. Rodney, for the defendant.

The general doctrine relied on for the complainant is not denied. But the rule is considered a hard one; and, though preserved for the sake of the system, it is constantly departed from, in extraordinary cases, by indirect allowances. Where a person is not strictly and technically a trustee the Court will allow compensation. And the

Opinion.

Court will often indirectly make an allowance to the trustee; as by an allowance to his agent or bailiff. A trustee has been allowed to employ an accountant and pay him out of the trust funds. 3 *P. Wms.* 249; 1 *Vern.* 144, 316; 1 *P. Wms.* 140; 2 *Madd. Ch. Rep.* 158; *Lewen on Trusts*, 449. (24 *Law Lib.* 228).

But further—the services rendered by the defendant did not fall within the trusteeship, as created by the declaration of trust. That only required him to *apply* the trust fund—not to *collect* it—not to enter into a series of lawsuits in defence of the judgment. These were services beyond his undertaking, and for these, at least, he is entitled to compensation. They extended through seven years, exceeded anything contemplated by the parties, and were acknowledged, and remuneration promised, by Mrs. Bradford.

JOHNS, JR., CHANCELLOR.—I would make the trustee some allowance for his care and trouble if I did not feel myself bound by the rule of equity that a voluntary trustee cannot, without a stipulation to that effect, be allowed compensation for his services. I consider that his undertaking bound him, not merely to the passive but to the active exercise of his trust,—to collect, as well as to receive and apply. In stating the account he will be allowed for expenses paid and be saved from loss, but without compensation.

Decree affirmed by the Court of Errors and Appeals, at the June Term, 1840. 3 *Harring. R.* 110.

Statement of the case.

WILLIAM DUTTON, JAMES DUTTON AND JESSE DUTTON, ROBERT DUTTON, TRUITT DUTTON, MANLOVE DUTTON, COMFORT DUTTON AND ELIZABETH DUTTON, which said JESSE, ROBERT, TRUITT, MANLOVE, COMFORT AND ELIZABETH are infants, &c., by WILLIAM DUTTON, their next friend.

vs.

PETER R. JACKSON.

Sussex, March T. 1840.

Heirs at law relieved, in equity, against a fraudulent conveyance by their ancestor.

A conveyance of land having been made by a husband, pending a proceeding for divorce, but with a reserved possession in the husband and upon a secret trust for his own use, the conveyance being for the purpose of defeating his wife's claim to alimony and the grantee being privy to the fraud,—a court of equity will, after the death of the grantor, hold such conveyance void against his heirs at law.

In such case the deed is not a mere voluntary conveyance, and as such valid and conclusive upon the heirs at law; but, being fraudulently made and not intended to pass title, it is void, as well against heirs as against creditors.

BILL IN EQUITY TO SET ASIDE A FRAUDULENT DEED.—This bill was filed by the children and heirs at law of Hezekiah Dutton, deceased, in order to set aside a deed executed by Dutton in his lifetime, to wit, on the 15th of April, 1834, conveying to the defendant, for the consideration of $250, certain real estate, worth from $800 to $1000. The bill alleged that the conveyance was made pending a petition for divorce on the part of the wife of Dutton in the Superior Court for Sussex County. On the 19th of April, four days after the execution of the deed, a divorce

Statement of the case.

was granted by the Court, with a decree allowing to the wife $10 per annum, for alimony out of the real and personal estate of Dutton. The bill alleged that the deed to Jackson was without consideration; that it was fraudulent and void, having been executed in order to defeat the wife of her claim either to dower or to alimony. It further alleged that Hezekiah Dutton remained in possession and offered to sell the lands, the defendant not objecting thereto; that he rented the lands and received the rents until his death, which took place June 14th, 1838. The bill also alleged that Dutton was intemperate and incapable of transacting business; that he was intoxicated when the deed in question was executed. The prayer was that the deed be declared fraudulent and void; that it be delivered up to be cancelled; and that the defendant be restrained by injunction from further prosecuting an action of trespass against the complainants; also from cutting timber on the land in controversy.

The answer of the defendant denied that the conveyance was voluntary and fraudulent, alleging that it was for the consideration of $250, as stated in the deed, and which the defendant alleged was its fair value; that he paid the greater part of the consideration in cash, and for the balance surrendered a note of Dutton which he held; that he had also been obliged to pay a judgment of Peter S. Parker against Dutton, which was a lien on the land conveyed. That Dutton did not, as the bill alleged, continue in possession until his death; but that in the last year of Dutton's lifetime the defendant exercised sundry acts of ownership.

The answer admitted that the defendant did assent to Dutton's selling the lands for $800; and agreed that he would convey them to a purchaser and allow Dutton the surplus of the purchase money after his payments and disbursements should be refunded, and also after some in-

Statement of the case.

debtedness subsequently contracted by Dutton to the defendant should be paid. The answer denied all charges of fraud on his part, or knowledge of any fraudulent intention on the part of Dutton. It also denied that Dutton was incapable of transacting business; it admitted that he sometimes drank, but denied that he was drunk at the time of the conveyance.

Depositions were taken on the part of the complainants. They proved the value of the land at various estimates by the witnesses, ranging from $700 to $1000. It was proved that Hezekiah Dutton was of intemperate habits, such as to unfit him for business; and that he was intoxicated at the time of executing this deed; that it was executed shortly previous to the decree for a divorce; that pending the proceeding for a divorce he sought to sell the land to several persons, offering it to one for $250, and proposing to another to give him a deed in order to cover the land and to defeat his wife's claim. It was proved by one witness that sometime after Dutton's wife had applied for a divoree, and before it was granted, the deponent heard Dutton ask the defendant whether, if he made him a deed for the land, his wife would get her dower, and that defendant said he did not think she would; that soon after Dutton told the deponent he had made a deed to Jackson for the land. It was further proved that, after the deed was made, Dutton continued in exclusive possession, received the rents and cut and sold wood with the defendant's knowledge; that the defendant had said he only paid $200 for the land, and on one occasion admitted that, if what he had paid for it were refunded, Dutton ought to have the land again.

The cause came before the Chancellor, at the March Term 1840, for a hearing upon the bill, answer, exhibits and depositions.

C. G. Ridgely, for the complainants, relied upon three

grounds for setting aside the deed, viz: 1. Intoxication. 2. *Suggestio falsi* by the defendant in stating to Dutton, as an inducement to the conveyance, that the deed would bar the wife's dower; and 3. A contemplated fraud upon the wife, in which, as he insisted, the defendant alone was concerned; that the grantor was not *particeps criminis.*

E. Wootten, for the defendant, argued that the complainants have no equity to set aside the deed for a fraud of such nature as is alleged in the bill. If there were any fraud Dutton was himself the guilty party. Upon well settled principles a court of equity would not relieve him against the consequences of his own fraud; neither will it relieve the complainants, his heirs at law, who, though innocent, are but volunteers, and are affected by the acts of their ancestor. They take representatively, and can claim only such title as the ancestor had. It is otherwise as to creditors, who, in such cases, claim not under the debtor but by a right paramount, which cannot be impaired by his acts. *Roberts on Frauds*, 641; *Jeremy's Equity*, 414; 1 *Madd. Ch. Pr.* 207.

JOHNS, JR., CHANCELLOR.

In this case, it appears from the testimony that the condition of the grantor placed him under circumstances peculiarly calculated to render him subject to the fraud and imposition in which he participated. The fraud perpetrated was intended and contrived by both grantor and grantee, to deprive the wife of alimony out of the land granted; she having instituted legal proceedings to obtain a divorce. The grantee, the present defendant, was privy and party, advising and approving, and at the same time informing the grantor that by the conveyance to him his wife would be defeated of her claim of dower. It also appears the parties did not intend a clear gift or conveyance of the entire interest, but evidently designed to invest the

grantee with the legal title, the grantor retaining the possession and the beneficial interest or control; and that he did, during his life, remain in possession and control of the land, as owner thereof, manaaging and using the property for his own benefit, without interference or interruption on the part of the grantee. There can be no doubt that in this case, at the time of the execution of the deed, a fraud was intended and perpetrated. Shall the grantee be allowed, under such a deed, to enforce his claim to the fee simple interest or title in the land against the children of the grantor, who claim as heirs at law, when by so doing he will be allowed to take advantage of his own fraudulent act? During the life of the father, he acted not as the person having both the legal and beneficial interest, but evidently in accordance with the understanding and agreement existing, and proved by his own declarations to have subsisted between them. It is not necessary for me, in a case like this, to decide as to the effect of voluntary conveyances. It is true they are void only as to creditors; for a man may give his property away, and it would bind him and all claiming under him. But that is not this case. The character of this transaction is very different. The defendant is relying on his right to retain that which he derived under a fraudulent grant made to him by his own advice; and the question is, shall he, to the prejudice of the children, retain the title thus fraudulently acquired? It does appear to me contrary to every principle of equity to allow such a deed to stand or to avail the party thus lending himself, not only as a willing instrument but as an active and efficient agent in the fraud. It would be allowing that which had its origin and whole foundation in fraud to acquire by time a validity which in its inception it did not possess. The settled rule of law and equity is, that fraud taints and vitiates so thoroughly the whole transaction that it is thereby rendered utterly void. Therefore, I am

of opinion that this deed, being by the parties at the time of its execution contrived for the purpose of perpetrating a fraud, is void; and, although it might be questioned whether the grantor, who was *particeps criminis*, would be permitted to come into a court of equity for relief, as he could not come with clean hands, the same objection does not apply to those claiming under him. 2 *Ves. Jr.* 295. The rule of equity precluding the party, I apprehend, is founded on principles of public policy and is strictly personal, the main scope and design of which would be rendered more effectual by sustaining the legal and equitable title of the heirs of the deceased grantor against the claim of the surviving grantee. For the deed being void for fraud no title ever passed to the defendant; the decree of the Chancellor, therefore, in declaring the transaction fraudulent, only ascertains and announces that which law, as well as equity, settles, viz: that no legal or valid deed ever existed. The power of the Court is not called into action to undo any thing, but simply to determine whether the parties, by the conveyance they attempted to make and execute, mutually intended to perpetrate a fraud; and, if so, the fraud and covin of the parties, not the decree of the Court, makes the instrument void. It is true, during the life of both parties, the equality in guilt may preclude either party from coming into chancery for relief, when there exists no evidence of actual imposition or fraud practiced by the grantee on the grantor; for that appearing would afford good ground for relief to the grantor, as thereby the case would vary, and he could no longer be considered in the light of a *particeps criminis*, but by the advantage taken of his situation and the imposition practiced upon him would be the person injured and defrauded. If the present case will not justify the action of a court of equity in favor of the heirs at law, because it does not appear that Jackson intended to defraud Dutton, although the transaction by both parties is admitted to be done, and

so declared, for a fraudulent purpose, I cannot imagine a case in which, where the grantor is *particeps* in the fraud, the heirs can be relieved. That the heirs should be entitled to relief, upon the strong equity their claim presents, would appear reasonable and just. The reason of the rule of equity which generally excludes a *particeps criminis* cannot apply to the heirs; they can come with clean hands and claim the judgment of the Court, determining and declaring the fraud; nor are they, as in the cases of fair, voluntary conveyances, concluded by the law of estoppel. For these reasons let there be a decree declaring the deed fraudulent and void, and also a perpetual injunction.

Decree reversed by the Court of Errors and Appeals, at the June Term, 1840. 3 *Harring. R.* 98.

JOHN KINSEY AND MARGARET HIS WIFE, WILLIAM E. BAILEY AND SARAH HIS WIFE, RICHARD B. SMEDLEY AND SUSANNA HIS WIFE AND THOMAS C. CHANDLER AND RACHEL HIS WIFE; AND DAVID WILSON AND ALEXANDER DIXON, EXECUTORS OF SAMUEL WOODWARD, DECEASED.

vs.

MARY WOODWARD.

New Castle, March T. 1842.

A bequest of personal property to the wife, with a devise that the real estate shall be sold and a fee simple title or titles conveyed being of equal "tenor" with those by which the testator held the same, is not such a devise as will defeat the widow's claim of dower, or put her to an election.

This was a case stated in equity, setting forth the following facts:—

Statement of the case.

Samuel Woodward died, seized in fee simple of a house and lot; also of a farm containing one hundred and twenty acres, with a stone house, barn, &c., erected thereon, having made his last will and testament, by which (after directing the payment of his debts and giving to his wife, the defendant, certain articles of furniture,) he devised as follows:—"and further my will is that my executors set apart the sum of three thousand dollars out of my estate, the interest of which they, or either of them, are to receive and pay over to my said wife, annually and every year, during the period of time that she remains my widow. *Item*, I give and bequeath to my two half-sisters, Lydia and Esther Woodward (children of my step-mother Hannah Woodward), to be equally divided between them, my undivided one equal fifth part of one thousand dollars, being the sum allotted by agreement to my said step-mother out of my father's estate, to create her annuity. *Item*, I give and bequeath to Eliza Toner (who has been living in my family some time past) the sum of one hundred dollars. *Item*, and I do hereby direct that as soon as practicable after my decease, the remainder of my household goods, of every description, stock and farming utensils, &c., together with all my real estate, be sold by my executors for the highest and best price that can be obtained; and I do authorize and empower them to convey to the purchaser or purchasers of said real estate a good and sufficient fee simple title or titles, being of equal tenor with those by which I now hold the same; and all the proceeds arising from said sale, both personal and real, with other moneys remaining either on hand or owing me at the time of my decease, to be equally divided amongst my four daughters, namely, Margaret Kinsey, Sarah Bailey, Susanna Smedley and Rachel Chandler; and in case either of my said daughters depart this life prior to my decease, then and in such case, the share of them so dying shall descend to their children in equal portions."

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The testator left a personal estate exceeding $3,000, after the payment of all debts and legacies, except the bequest to his wife of the interest of $3,000, during widowhood.

The complainants were the residuary legatees and the executor of S. Woodward, deceased. The defendant claimed both the legacies bequeathed to her by the will and also her dower in the testator's real estate.

The question submitted to the Chancellor was, whether these bequests were in equity a bar to the dower, so as to put the widow to her election. The case was heard before the Chancellor, at the March T., 1842.

J. A. Bayard, for the complainants.

J. Wales, for the defendant.

JOHNS, JR., CHANCELLOR.—The question is, whether there is such a conflict between the will of S. Woodward and the claim of his widow to dower as shall put her to an election, to take the bequest to her in the will or the dower. In my view, the bequest of a personal legacy to the wife and a direction to executors to sell the real estate would not put the widow to her election, any more than a direct devise of such land to a third person after a pecuniary legacy to the wife. The question, then, is, whether the direction to convey a good and sufficient fee simple title to the purchaser can vary the case, so as to put the widow to her election. To say so would be to give to the directions about conveyance a greater effect than the direction to sell; but the executors could convey no greater title than that which they were authorized by the will to sell. It seems to come back to the same question, whether the land is devised to be sold free of dower. On examining the cases I think that this does not come within any of those where the widow was put to her election. Those cases are such where the assertion of the claim to dower

Syllabus.

would come into conflict with the possession of the land devised, and thus defeat the will. There is no such difficulty here. The testator directed a sale only of his real estate—a sale of his title. This can be carried out by a sale subject to dower; and the conveyance of a fee simple title may be made, so far as the testator has ordered a sale to be made. It does not appear that the testator meant that his children should have the proceeds of sale of their mother's share in the real estate. And if the land shall be sold clear of dower, it is obviously the sale of a greater estate than the testator held at the date of the will, which it cannot be denied was subject to the wife's claim of dower. If on this will the widow can be put to her election, it will be difficult to find any case of a devise of land, after a legacy to the wife, that would not fall within the same principle.

Decree affirmed by the Court of Errors and Appeals, at the June Term 1842. 3. *Harring R.* 459.

JOSEPH S. BAILEY AND SAMUEL BAILEY,

vs.

JOSEPH T. BAILEY AND HENRY LATIMER, EXECUTORS OF JOSEPH BAILEY, DECEASED.

New Castle, Sept. T. 1843.

Principles upon which a court of equity controls the exercise of a power to appoint new trustees.

The court will not prevent the exercise of a discretion given for the appointment of trustees, but will see that it has been duly exercised, so

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as to subserve the purposes contemplated in the creation of the power.

The *cestui que trust*, under a devise of a fund in trust, being authorized, upon the death or refusal of the trustee to act, to appoint "a suitable person" to act in his place—*Held*, that the son of the *cestui que trust*—a young man and without property—was not such "suitable person," nor was he entitled to a decree for the delivery of the trust funds, without security first given to the satisfaction of the Court.

Joseph Bailey, by his will dated Feb. 10th, 1843, devised the residue of his estate equally to his two sons, one of whom was Samuel Bailey. By a codicil he devised the share before given to Samuel to John R. Latimer, in trust for the benefit of the said Samuel Bailey and his wife, during their joint lives and the life of such survivor; and, after the death of the survivor, he directed that the estate held in trust should pass to the said Samuel's heirs-at-law. The codicil provided that if John R. Latimer, the trustee appointed, should refuse to act, or die before the execution of the trust, the said Samuel might appoint "a suitable person" as trustee, who should have all the power of a trustee under the will. On the testator's decease Latimer declined the trust; and thereupon Samuel Bailey appointed his son, Joseph S. Bailey, to be the trustee. This bill was filed by Joseph S. Bailey, as such trustee, against the defendants, as executors of the testator, for a transfer to him of Samuel Bailey's share of the estate. The question raised at the hearing was whether the complainant was "a suitable person" within the provision of the will.

W. H. Rogers and *J. M. Clayton* for the complainants.

E. W. Gilpin for the defendants.

JOHNS, JR., CHANCELLOR.—Before considering the question whether the party complainant is entitled to an unconditional decree, I will advert to the power or jurisdiction of this Court over the discretion of the party in

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making the appointment. It has been supposed that the power having been granted to Samuel Bailey to make the appointment, this Court has no jurisdiction to control the discretion of the person to whom the testator has confided the exercise of the power. There are cases in which the exercise of a power by a person under a will cannot be interfered with by this Court; but this is not such, and even in those cases, if the party, in the exercise of the appointing power, should appoint the funds, over which he has the right of distribution, to himself, the abuse of the power would be corrected. In this case the testator has not authorized the appointment to be made by Samuel of such a person as he should consider suitable, so as to render his opinion conclusive, but has qualified the exercise of the power by requiring "a suitable person" to be appointed. The power of appointment under this will is not conferred in so unqualified a manner as it was granted in *Webb vs. Shaftesbury*, 7 *Ves. Jr.* 480, in which the testator thus expressed the grant: "I do hereby authorize and empower the said Edward Arrowsmith, at any time during his life, by any deed or instrument under his hand and seal, to nominate and appoint one or more person or persons to be a trustee or trustees for all or any part of the purposes and trusts in this my will contained, and who shall act in all things as fully and effectually as the said Edward Arrowsmith; and he and they shall, upon the death of the said Edward Arrowsmith, be entitled to the same commission which I have given to him; and, when such new trustee or trustees shall be so nominated and appointed as aforesaid, I direct the said Edward Arrowsmith to convey, assure, assign and transfer, all my real and personal estate into the names of himself and such new trustee or trustees." The argument of the counsel in that case relied upon the same matters which have been urged in reference to the exercise of the power of appointment under the will of Joseph Bailey. Lord Chancellor Eldon says, "the defendant ap-

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pears to me to have no interest whatsoever in the act of appointing a new trustee. If it stands upon this clause alone, he has no other discretion with regard to the appointment of a new trustee than trustees in ordinary cases. It is true, he can, by the appointment of a trustee, convey a much more extensive interest than a trustee appointing a new one in general cases can. But that circumstance does not at all affect the control of the Court over his discretion, though it imposes upon the Court a duty more especially to take care that its own discretion is wisely exercised; for when such a remuneration is given to the new trustee as Mr. Arrowsmith can give, no one motive ought to operate upon him in the appointment but to do the very best thing, not for himself or the persons whom he is to appoint, but for those whose interests they are to take care of. There is no doubt, therefore, of the control of the Court over his discretion. It does not prevent the exercise of his discretion, but takes care that it shall be duly exercised. In the ordinary case, trustees, parties to the suit, will not be allowed to change the trustees without the authority of the Court. There is no doubt the Court will restrain; and it is not a sufficient answer that the Court will take care to prevent the consequences; for the mischief is in a great measure done by the appointment, *i. e.* the necessity of getting back the legal estate. It is enough to say, the Court does not permit the discretion to be exercised except under the direction of the Court." If, in the case I have adverted to, the Chancellor, when the person authorized to appoint had no interest, considered it necessary to control the exercise of the discretionary power, how much more essential is it that the exercise of the power in the hands of a person interested in obtaining possession of the fund should be controlled, and that his discretion should not be permitted to be exercised except under the direction of the Court, and only in such a manner as will take care of the interests of the trust, or so as to do the very best thing, not for him-

self or the person whom he appoints, but for those whose interests he is to take care of.

In *Brown vs. Higgs*, 8 *Ves. Jr.* 570, a distinction is very properly taken by Lord Chancellor Eldon, that "where there is a mere power of disposing and that power is not executed, this Court cannot execute it. It is equally clear, that whenever a trust is created, and the execution of that trust fails by the death of the trustee or by accident, this Court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to this Court a power which the party to whom it is given is entrusted and requested to execute; and with regard to that species of power the Court consider it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the Court will to a certain extent discharge the duty in his room and place." After referring to the several cases establishing the rule, the Chancellor observes, "the principle of that case (*Harding vs. Glyn*, 1 *Atk. R.* 469) and of *Richardson vs. Chapman*, 5 *Bro. Parl. Cas.* 400, which went to the House of Lords, and all these cases, is that if the power is a power which it is the duty of the party to execute, made his duty by the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it."

In the present case the appointment has been made by Samuel Bailey under a power contained in the will authorizing him to appoint "a suitable person" as trustee, in case of the death of John R. Latimer or his refusing to

act. In order to arrive at a correct conclusion upon this subject it becomes necessary to consider the object and design of the testator in creating the trust, and also the reason why the power of appointing a trustee was conferred on his son Samuel. It is apparent the testator created the trust to prevent the fund ever becoming liable to pay the then existing debts of his son Samuel, and designed to secure it in the hands of a trustee who could not part with the legal title, so as to place it under the control of his son, without being guilty of a breach of trust. At the same time that he thus guarded the capital he allowed to his son the use and benefit of the income, and also required his consent in the change of investment. Having thus secured the legal title and expressly provided against the same becoming subject to the control of his son while indebted, and yet allowing him the interest and the exercise of his judgment, so far as to assent or dissent as to any change of investment, it was reasonable and proper, if the trustee appointed died or refused to act, that he should confer upon the *cestui que trust* the power to appoint a new trustee, provided he appointed "a suitable person." Thus qualifying the exercise of the power of appointment, he conferred it. It is not granted absolutely and to be exercised irrespective of the trust; but is expressly intended to be exercised to preserve the trust and give effect to the testator's intention; which intention evidently was that the legal estate should not be subject to the control of his son, Samuel, until he had discharged all his debts except that due to the Bank of Delaware. When free from embarrassment the father was willing again to confide to his son the fund he intended for the support of him and his family; but not until then. Having in view this object he has created the trust, and in his appointment of a trustee has made such a selection as, had the individual accepted, would have fully accomplished the object contemplated by the testator; for the property of John R. Latimer afforded

ample security for the faithful discharge of the trust. He having declined and the son, under the power contained in the will authorizing him to appoint "a suitable person," having appointed his own son, a young man of moral character but not appearing from any evidence before me to be possessed of any property, asks a decree of this Court, as against the executors, for the transfer of the property to him as a suitable person. Regarding the relation of the person appointed to the trust, as being that of a son to a father, and consequently subject to his influence and control, if we consider the object of the testator in creating the trust the appointment could not be considered such as the testator contemplated when he directed that "a suitable person" should be appointed. But when, further, it does not appear that the son thus appointed has any property independent of his father, and such in the present case I have a right to presume to be the fact, as I have no evidence of any property, which, if belonging to him, no doubt would have been set forth, it may with propriety be said the power has not been exercised as intended by the testator, and the person thus appointed and asking for the trust fund by a decree of this Court, cannot be considered as entitled thereto, unless upon such terms as will fully protect and secure the trust fund over which this Court has jurisdiction and is bound to take care that it be applied according to the intention of the testator.

A decree was entered to the effect, that upon the execution by the trustee of a bond for the faithful performance of the duties of the trust, with surety to be approved by the Chancellor, the executors of Joseph Bailey, deceased, should deliver to him the trust fund.

Statement of the case.

THOMAS CARTMELL, ADMINISTRATOR OF MARGARET CARTMELL, DECEASED,

vs.

JOSEPH PERKINS.

New Castle, Feb. T. 1845.

A legacy charged upon land was bequeathed to a married woman, subject to the deduction of a book account held by the testator against her. The testator held a note of the legatee's husband, but no refcrence to this note was made in the bequest. The husband also became indebted to the executor of the testator for goods purchased at a vendue of the personal estate. The husband died before the wife, without having reduced the legacy into his possession and without any settlement with the executor touching the same or his own indebtedness to the estate of the testator. *Held*, that on a bill filed by the administrator of the wife (who had survived her husband and died) to recover the legacy from the devisee of the land charged, the husband's indebtedness to the estate of the testator could not be treated as payment of the legacy.

The mere omission of a husband to reduce his wife's *chose in action* into his possession, for a lapse of time ordinarily sufficient to raise a presumption of payment, does not raise such presumption, so as to bar the wife's right, by survivorship, to recover such *chose in action* after the husband's death.

Lapse of time does not bar a *direct* trust as between the trustee and *cestui que trust*; otherwise, as to *constructive* trusts.

A legacy charged upon land, and payable by the devisee of the land, is a trust, falling within the exclusive jurisdiction of courts of equity, and as such is not subject to the equitable defence of lapse of time, by analogy to the Statute of Limitations; otherwise, of a legacy payable by the executor or administrator out of the personal estate, and which is recoverable both at law and in equity.

BILL IN EQUITY FOR A LEGACY CHARGED ON LAND.—Caleb Perkins, by his last will and testament, dated May 24th, 1804, bequeathed to his daughter Margaret, then the wife

Statement of the case.

of Thomas Cartmell, the sum of £100, subject to the deduction of such book account as the testator might have against her at his decease—the legacy to be paid to her, within three years after the testator's decease, by his son Joseph Perkins, to whom he had devised certain real estate charged with its payment. No question in this case arose as to the construction of the will. Thomas Cartmell and his wife Margaret survived the testator. Afterward, on the 9th of January, 1838, Cartmell died. The wife, surviving him, died on the 24th of December, 1841; and letters of administration upon her estate were granted to her son, Thomas Cartmell, the complainant. The bill is filed by him, as the representative of Margaret Cartmell, to recover the legacy from Joseph Perkins, the devisee of the land charged therewith.

The answer of the defendant, admitting the bequest of the legacy and that it was a charge upon the lands devised to the defendant, set up two defences. One was payment or satisfaction of the legacy, resulting in part from a note for £45 due from Cartmell, the husband of the legatee, to the testator in his lifetime—in part from a debt due from Cartmell to the executor of the testator for goods purchased at a vendue; and against the residue of the legacy the answer claimed, under the terms of the bequest, to set a book account left by the testator against the legatee, Margaret Cartmell, to the amount of £50 5s. The other defence was the lapse of time, as raising a presumption of payment, by analogy to the Satute of Limitations, the benefit of which defence the answer prayed, as if the same had been pleaded.

The cause was put at issue and depositions taken. The only material facts proved were that the complainant called on the defendant, before the filing of the bill, to examine the testator's books and come to a settlement; that there was a charge on the books of £11 5s. against

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Margaret Cartmell; and the defendant showed a note of Thomas Cartmell, deceased, to the testator for £45 5s; also a vendue list, containing articles purchased at the vendue by Thomas Cartmell amounting to $36, which defendant said were the only charges he had against Thomas Cartmell, deceased, or his wife; and that defendant declined a reference.

The cause came before the Chancellor, at the March Term 1845, for a hearing upon the bill, answer, exhibits and depositions.

E. W. Gilpin for the complainant.

W. H. Rogers for the defendant.

JOHNS, JR., CHANCELLOR.—The circumstances of this case render it necessary to ascertain whether the trust under the will has been executed by the devisee of the land charged, as directed by the testator, the author of the trust; and whether the trustee's liability to account in a court of equity has ever been discharged. This I so consider, because there is no proof of any settlement with the husband in his lifetime, nor any evidence tending to show his assent to the appropriation of the legacy to extinguish his own indebtedness to the testator's estate; and the note or evidence of that indebtedness remained in the possession of Thomas Perkins, the executor, not cancelled nor delivered up.

The legacy to the daughter, being charged on the farm devised to his son, and being given subject to no other deduction than the charges on the testator's books against the daughter, the attempt of the son to pay the same by deducting the husband's debts appears to me contrary to the intention of the testator; and further, it explains the delay and omission of the husband to adopt adversary proceedings for its recovery in his lifetime.

Opinion:—legacy to wife not barred by husband's delay to collect.

The legacy being a *chose in action*, or a right of the wife only to be divested by an affirmative act of the husband—, she being the *cestui que trust* and the interest such as would belong to her, she surviving her husband, and would go to her executors; therefore, on his death, unless her right has been divested by some act of the husband, it appears to me contrary to principle to apply the doctrine of presumption to such a case; for such an application of it would defeat the wife's right by survivorship to all her *choses in action* whenever she was so fortunate as to enjoy a long state of coverture. Such a doctrine has never been sanctioned, either in law or equity; for the legal maxim is that *presumptio juris nemini facit injuriam.* Nor do we find any such effect on her rights by the Statute of Limitations. The period of coverture, as to her, is one of disability; and her rights are protected until she becomes *sui juris* and capable of enforcing them. It will not do to apply the doctrine of presumption and conclude the wife thereby, when surviving, simply because the husband has the legal right to receive payment or to collect by suit. For the husband has this right, if he chooses to exercise it, in relation to all her *choses in action;* and, therefore, from the lapse of time during coverture, payment to him must be presumed exclusive of proof of actual payment; the necessary consequence must follow, that after twenty years coverture, on surviving her husband, she is deprived of all her rights, and moreover excluded from the saving clauses in the various acts of limitation.

I shall now proceed to explain why I do not regard the case as subject to the equitable doctrine of presumption, when considered with reference to the rule as established by equity decisions; and I shall also explain the reason why I now am compelled by the same authority to exclude it from the rule as drawn from the Statute of Limitations by analogy.

Opinion:—*direct* trusts not barred, but *constructive* only.

Before entering upon this branch of the case I would refer to the decision of Lord Hardwicke in *Garforth v. Bradley*, 2 *Ves. Sr.* 675, as settling the right of the wife surviving, and of her executors, to a legacy given to her whilst covert.

The case before me is that of a direct trust, being a devise of land by a father to his son, charged with the payment thereout of a sum of money to his daughter, she being covert; and, in this case, the son yet living and the owner and possessor of the land, under the father's will, as against the personal representative of the deceased sister, who survived her husband, he relies on the equitable doctrine that from the lapse of time this Court is bound to presume payment.

In the case of *Duvcouche vs. Savetier*, 3 *John. Ch. Rep.* 216, Chancellor Kent says, "All the cases admit that no time bars a direct trust, as between trustee and *cestui que trust.* The settled rule is, (and so it was recently declared in *Cholmondeley vs. Clinton*, 2 *Mer. Rep.* 360,) that, so long as a trust subsists, the right of a *cestui que trust* cannot be barred by the length of time during which he has been out of possession, and that he can only be barred by barring and excluding the estate of the trustee." This general rule applies to the present case; for the devisee of the land charged is a trustee, to the extent of the sum charged and payable out of the land, and the claim is made by the personal representative of the *cestui que trust.*

There is a class of cases which admit a reasonable time to be a bar; but these are cases in which a party is turned into a trustee by matter of evidence merely, and who took possession originally in his own right and was *prima facie* the owner. Thus in *Bonney vs. Ridgard*, 1 *Cox R.* 145, *cited and approved in* 4 *Bro. Ch. Rep.* 130; 17 *Ves. Jr.* 97, 165, the fraudulent purchaser of a leasehold estate from an executor was not permitted by Lord Kenyon to be

Opinion :—interests exclusively equitable not affected by the Statute.

turned into a trustee for the children of the testator, in consequence of the great lapse of time between the purchase and the filing of the bill. So, in the cases of *Andrew vs. Wrigley, and Beckford vs. Wade*, 4 *Bro. Ch. Rep.* 125; 17 *Ves.* 87, the suits were brought to avoid purchases on the ground of fraud, and to turn them into trustees by construction; and the Court held, that, in these cases of a possible, eventual trust, depending upon proof, length of possession was and ought to be a bar, upon the principle of the Statute of Limitations. But these cases have no relation to suits against the very trustee by the *cestui que trust* or his personal representative. The above cases are sufficient to illustrate the rule of equity relative to the doctrine of presumption from lapse of time, as will be apparent in all in which it has been applied.

It being manifest that the rule of presumption, as stated by Chancellor Kent in the case referred to, is sustained by all the equity decisions; and, therefore, that it cannot be applied to the present suit, I shall now proceed to consider the manner in which equity applies by analogy the Statute of Limitations. For it is well settled that the Statute of Limitations is a good plea in equity, as well as at law. This has been the uniformly acknowledged doctrine of a court of equity ever since the statute of James I.

"The great and marked exception to this ordinary application of the statute to equity cases," Chancellor Kent remarks, in *Kane vs. Bloodgood*, 7 *Johns. Ch. Rep.* 113, "exists in the matter of trusts falling exclusively within equity jurisdiction." The first case, defining with precision a trust not affected by the statutes, was that of *Lockey vs. Lockey*, decided by Lord Macclesfield in 1719, *Prec. in Ch.* 518. The doctrine of this case is that the trusts which are not within the Statute are those which are creatures of the court of equity, and not within the cognizance of a court of law (*See* 2 *Mer. Rep.*, 360) "that

Opinion :—interests exclusively equitable not affected by the Statute.

so long as the trust subsisted, so long it was impossible that the *cestui que trust* could be barred." "The *cestui que trust* could only be barred by barring and excluding the estate of the trustee."

It is a general rule in the books, that there is no statute of limitations to a charge upon an estate. Thus, in *Collins vs. Goodall*, 2 *Vern.* 235, the Statute was pleaded to a bill for rent charged on land by will; and it was held that it did not apply. Hence, in the modern case of *Stackhouse vs. Barniston*, 10 *Ves. Jr.* 453, the Master of the Rolls said that in equity the Statute is never permitted to prevail against a legal rent charge. And in *Norton vs. Turvill*, 2 *P. Wms.* 144, a wife, before marriage, had conveyed her estate in trust to her separate use, and during coverture had borrowed money on bond. The bond was held void; and after her death a bill was filed against her husband and her executors. The Master of the Rolls held that her separate estate was a trust estate for the payment of debts; and, speaking in reference to that trust, he said a trust was not within the Statute of Limitations. These cases of charges upon land support the distinction, which is the prevailing one, that the trusts upon which the Statute does not operate are those trusts of which equity has the proper and exclusive cognizance. In the case of *Kane vs. Bloodgood*, Chancellor Kent remarks that he takes it for granted as the assumed and settled doctrine, that an action at law will not lie in the case of a mere charge upon land, where there is no personal undertaking.

The application of the Statute by analogy cannot well be made to those peculiar trusts which are the mere creatures of equity; for there is no ground for comparison; but when the same subject matter of demand in equity can also be made the subject of an action at law the rule of analogy applies in all its force. As Lord Redesdale observed in *Bond vs. Hopkins*, 1 *Sch.* & *Lef.* 413, the Statute

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of Limitations does not apply in terms to proceedings in courts of equity, but equitable titles are affected by analogy to it. In *Hovenden vs. Lord Annesly*, 2 *Sch. & Lef.* 607, Lord Redesdale went much more at large into the doctrine of the limitation of suits in equity; and the principle of that case is, that where the party has a legal, as well as an equitable remedy, for the same cause of action, if the equitable title be not acted on in the same time the legal title should be, it is barred. This is the principle that pervades the cases.

If, in the present case, the legacy had been payable by the executor out of the personal assets, then, the jurisdiction in the courts of common law and courts of equity upon such a cause of action being concurrent, the analogy would exist and the statute would be a bar. For, by the act in *Dig. Del. Laws*, 228, "an action of assumpsit may be maintained against an executor or administrator for a legacy or a distributive share. Assets in the hands of an executor or administrator to pay a legacy shall create a legal liability and raise a consequent promise to pay. This action shall not lie for a legacy which is either directly or by implication the subject of a trust." But this case belongs exclusively to a court of equity; for the legacy being a sum charged on and payable out of land, and therefore a direct trust, it is expressly excluded by our Act of Assembly from the jurisdiction of a court of common law; and, it must, therefore, be subject to the rule of equity excluding it from the operation of the Statute of Limitations.

Before concluding this branch of the case I will only add, in support of the opinion I have expressed, what was said by Chief Justice Spencer, in 20 *Johns. Rep.* 576, 610, who, after adverting with approbation to the opinion of Lord Hardwicke in *Sturt vs. Melish*, 2 *Atk.* 610, and showing that the plaintiff had ample

remedy at law, observed, "I have therefore no hesitation in saying that, in a case where there is a concurrent jurisdiction in the courts of common law and equity, the rule must be the same, and the Statute of Limitations may be pleaded, with the same effect in one court as in the other. In the case of trust and fraud, peculiarly, appropriately and exclusively the objects of equity jurisdiction, according to the established doctrine, the Statute cannot be pleaded."

The defendant in the present case, not being entitled to avail himself of any benefit from the Statute of Limitations, and not being embraced within the rule of presumption from lapse of time, and having, as appears from the answer and exhibits in the cause, not accounted for or paid the legacy, according to the mode specially directed by the testator, must be held still bound in equity for the legacy. I must, therefore, make an interlocutory decree for an account.

Decree reversed by the Court of Errors and Appeals, at the June Term 1845. 4 *Harrington's Rep.* 270.

STEPHEN COLWELL, ADMINISTRATOR D. B. N. C. T. A. OF WILLIAM T. SMITH, DECEASED, ALSO EXECUTOR OF SAMUEL RICHARDS, DECEASED, AND SAMUEL N. RICHARDS.

vs.

JOHN MILES AND HANNAH, HIS WIFE.

New Castle, Sept. T. 1845.

A testator, domiciled in Pennsylvania, after disposing of his estate in eight parts, in order to equalize the distribution of it, set a value upon the several lands devised, and charged each of them, in the hands of the devisee, with its excess in value over one equal eighth part of the

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whole estate—such excess to be paid, within six months after the testator's decease, to his executors as part of the residuary estate. The lands were devised to trustees for the several parties interested, the trustees being also the executors. Part of the devised lands were situated in Delaware, and were valued by the testator at $20,000, which sum, upon the settlement of the testamentary accounts, was found to exceed one equal eighth part of the testator's whole estate. On a bill filed by the administrator d. b. n. c. t. a. of the testator and the executor of the survivor of the trustees, to charge the lands in Delaware with the excess, *Held*,

1. That the persons beneficially interested in the excess are not necessary parties.
2. In determining the existence and amount of the excess, the amount of the personal estate of the testator is to be taken as it is ascertained by the testamentary accounts settled by the Court having jurisdiction at the domicile of the testator.
3. The land sought to be charged, having been devised in trust for one for life (to whom was given the rents and profits) with remainder to his children, the omission of the trustees to collect the excess from the tenant for life is no bar to relief against the remainderman for the principal of the excess.
4. The receipt by trustees of rents and profits sufficient to pay the excess does not, unless paid over to the executor, exonerate the lands, in the hands of the remainderman, from payment of the principal of the excess: otherwise, as to interest on the excess accrued prior to the possession of the remainderman.
5. Lapse of time in collecting the excess is no bar, the trustees who were to pay and the executors who were to receive being the same persons.
6. Delay in the final settlement of testamentary accounts is not *laches*, if caused by *lis pendens*.
7. The charge of the excess, being upon an undivided share of certain lands, is not discharged by proceedings for partition, under which the real estate comes to be held in possession by the devisee in severalty.

BILL IN EQUITY, filed under the following circumstances:

William T. Smith, by his last will and testament, bearing date in the year 1812, after distributing his estate proceeded, in order to equalize the same amongst his children, to fix a valuation on the several parts of his real estate, and directed that the excess of any part in value above an

equal share of the whole should be deducted from such part, so as to equalize any that might be deficient. For the purpose of giving effect to his intention he devised the real estate to Joseph Ball and Samuel Richards, in trust, with power to pay, as trustees, to themselves, as executors, such excess. Part of the lands devised to the trustees were situated in the State of Delaware. The testator devised to the said Joseph Ball and Samuel Richards one third part of a farm, situated in New Castle county, which he valued at $20,000; also one third part of a tract of land adjoining the before mentioned farm, together with a third part of all the implements of husbandry and stock belonging to said farm and tract of land, the share of which tract of land, implements and stocks he valued at $2,866.33: also he bequeathed to the trustees the debt due to him from his son William, as charged on his book H; to hold the said property "in trust, nevertheless, that the said Joseph Ball and Samuel Richards and the survivor of them, and the heirs and assigns of such survivor, shall and will, from time to time and at all times hereafter, during the natural life of my said son William T. Smith, Jr., permit and suffer my said son William to have, take, receive and enjoy all and every the rents, issues and profits of the said devised premises, as the same shall become due and payable; and from and after the decease of my said son William, then in trust for the children of my said son William, their heirs and assigns forever, as tenants in common, and to be equally divided between them, share and share alike; *provided always*, and it is my will, that if the premises devised, as last aforesaid, to the said Joseph Ball and Samuel Richards, at the value aforesaid, together with the debt due as aforesaid from my son William T. Smith, Jr., and charged on my book H. should exceed in value the one eighth part of my whole estate, that then the said Joseph Ball and Samuel Richards shall and do pay, *within six months after my decease*, to my executors, to

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be disposed of as is hereinafter directed, so much money as the above devised premises, at the value aforesaid, with the debt aforesaid, shall exceed in value the one eighth part of my whole estate. And I do hereby will and direct that the one undivided third part of the farm and the one undivided third part of the tract of land, situate in the State of Delaware and last devised as aforesaid to the said Joseph Ball and Samuel Richards, shall stand and be charged and chargeable with the payment of the sum which the premises last aforesaid devised, at the value aforesaid, with the debt aforesaid, shall exceed the value of one eighth part of my whole estate."

William T. Smith died on the 23d of February, 1812. Joseph Ball and Samuel Richards, who were named as executors, proved the will and took letters testamentary. Joseph Ball died, and afterward Samuel Richards also. Stephen Colwell became administrator d. b. n. c. t. a. of the testator, and also was executor of Samuel Richards deceased. The bill was filed by Colwell and by Samuel N. Richards, as heir at law of Samuel Richards deceased, in order to raise out of the lands in Delaware, devised in trust to William T. Smith, Jr., and his children, an alleged excess in value of said devises over and above the one eighth part of the testator's whole estate.

The bill alleged that the executors proceeded, with all due diligence, to bring the estate to a judicial settlement by the tribunal to which jurisdiction in that matter belonged, in order that it might (among other results) be ascertained whether the said William T. Smith, Jr. had received, in the said specific devises, more than his eighth part of the testator's estate, according to the provisions of the said last will and testament, and with which surplus, if any, his devised share of the lands in Delaware were charged by the said last will and testament; that the said executors were unable to settle an account of the adminis-

tration of said estate until the 5th day of January, 1818, on which day they did settle such account before the Register of Wills, &c., for the city and county of Philadelphia, to whom jurisdiction in that behalf belonged; and the same was approved and passed by him and transmitted to the Orphans Court for the city and county of Philadelphia for confirmation; to which tribunal jurisdiction in that behalf belonged; that the executors knew the said account was in all respects just, and would have finally settled and ascertained the amount of the excess of said William's share and the sum chargeable upon the lands in Delaware devised to him; but, exceptions being filed to said account in the Orphans Court, there has been a continued litigation kept up, by means whereof a decree of the Orphans Court was not obtained until the 24th day of April, 1841.

The bill further alleged that William T. Smith Jr. departed this life in the year 1838; that he, in his lifetime, and his children, since his decease, had full knowledge of said *lis pendens* and of the proceedings therein; the children being entitled to the remainder in fee in said lands after the death of their father—which said children were James Smith and Hannah W. Smith; that Hannah is intermarried with John Miles, Esq., and that James Smith having departed this life, intestate and without issue, before the death of his said father, the entire interest in the lands so devised to the said William T. Smith, Jr., became and is vested in the said John Miles and Hannah his wife; that the said William T. Smith Jr. and his son-in-law John Miles participated largely and actively in the opposition to the said account, and were mainly instrumental in the long delay in the settlement of the same.

The bill further alleged that there was a legal controversy, involving the title to said lands, beginning in the year 1819 and not terminating until 1825; that large ex-

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penses were incurred by the trustee in defending the title of the lands; that the costs and expenses having been all paid by the said trustee, the share of them apportioned to the lands devised as aforesaid amounts to the sum of $1,596.24, with interest, as per schedule annexed. That the decree of the Orphans Court aforesaid has established the amount of the residuary estate of the said William T. Smith; and that the excess of the devises to William T. Smith Jr. and the amount of the charges on the said lands in Delaware so devised to the said William T. Smith Jr. thereby appears to be $998.42, with interest from the date of testator's death.

The bill further alleged that proceedings for partition in chancery were instituted between the devisees of the testator and the other tenants in common of the lands in Delaware, by which the share of the said William T. Smith Jr. with remainder to his children, had been assigned to him in severalty; that the devisees of William T. Smith, representing the deficient shares, are entitled to the said money, so charged as aforesaid upon the lands in Delaware, and threaten to hold the complainants personally responsible, unless they prosecute and collect the same. The bill prayed that an account may be taken, to ascertain the amount due and chargeable, and that the same may be decreed to be a specific charge on the land held by defendants, and the payment thereof enforced by sale under a decree.

The answer, admitting the allegations of the bill touching the provisions of the will of William T. Smith, deceased, denied that there was any excess in the value of the lands devised, over and above the equal eighth part of the testator's estate, insisting that the then balance of said estate had not been legally ascertained for the purposes of this suit; that to charge the lands of the defendants with any such excess the amount of the testator's personal

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estate was to be ascertained, not by testamentary accounts passed in the Courts of Pennsylvania, but by an account of the personal estate, to be taken in this Court. The answer further insisted that the trustees might and ought to have collected such excess (if any there were) out of the rents and profits of the said lands in the lifetime of the tenant for life; and that, having failed to do so, they had no equity against the defendants, who were tenants in remainder; that from the death of the testator in 1812 until 1817, Samuel Richards, one of the trustees, had held the lands and received the rents, he being then a trustee of the share devised to William T. Smith, Jr., and also a tenant in common of a third part thereof; and that during his said possession he received rents of the trust estate sufficient to have paid the excess claimed; that in 1817 he sold his own share, and delivered up possession of the lands to William T. Smith Jr. who thenceforth held the same as his absolute property, without any claim on the part of the trustees, until his death in 1838, when he was succeeded in his possession by the present defendants, Miles and wife; and the defendants relied upon the lapse of time and the laches of the trustees as a bar to this suit. The answers denied that the executors had proceeded with due diligence to a settlement of the testator's estate; alleging that, although there was a *lis pendens* in the Orphans Court of Philadelphia until the year 1841, it resulted from illegal claims on the part of the executors, which were finally disallowed. It admitted the several proceedings had for partition of the lands in Delaware, between the devisees of said testator and other tenants in common, and insisted that under said proceedings the trustee having suffered the property to come into possession of William T. Smith, without any claim on account of said trusts, it was held by him, and is now held by his children, free and discharged from the same. The answer further insisted that the bill was defective in not joining as parties the other devisees and legatees under the will of William T. Smith, deceased.

Opinion :—as to defect of parties.

The cause came before the Chancellor, at the Sept. T. 1845, for a hearing upon the bill, answer and exhibits.

R. Frame and *John Sergeant*, for the complainants.

W. H. Rogers and *John Miles* for the defendants.

JOHNS, JR., CHANCELLOR.—The defendants resist the relief sought in this case on several grounds, which I will consider separately.

First, it is objected that there is a defect of parties, in the non-joinder of the other devisees under William T. Smith's will.

The claim is to enforce payment to the executors, as directed by the will, of a sum out of real estate in Delaware, if it should be required to equalize the shares; the testator's domicile being in Pennsylvania, and the jurisdiction of the personal estate belonging to the place of domicile. The executor, in his lifetime, was the party to receive, and the trustee the person authorized by the will to pay, and the *cestui que trust* the person beneficially interested in the land, or entitled to the receipt of the rents and profits thereof, and thus affected in interest; and, therefore, was a necessary party. The original executors and trustees being dead, the parties complainant, now before this Court, are the personal representative of the surviving trustee and of the testator, and also the heir at law of the trustee. The object of this suit is not to adjust and distribute the personal estate of the testator, William T. Smith. That has been done in Pennsylvania; and there all parties interested in the estate were parties, and have been heard by the tribunal having jurisdiction of the personalty, by whose action and judgments their respective rights have been ascertained and judicially determined; but that tribunal excluded from its consideration all matters connect-

ed with the trust estate in the State of Delaware, although by the decision upon the personalty the amount chargeable against the trust fund in Delaware was ascertained.

The will requiring the trustee to pay what might be the excess of the value of the trust estate to the executor, if the trustee and the executor had been different persons, it is apparent that on non-payment the executor would have been the proper party claimant and would have had a right to enforce payment from the trustee; and had the *cestui que trust* been let into possession of the trust estate it could not vary the right of the executor. He represents the rights and interests of, and is responsible to, all the devisees who are to receive payment through him as executor. The death of the executor and the grant of administration d. b. n. c. t. a. confers upon the administrator the same right. The joinder of the executor of the trustee is requisite, as a party accountable, and the heir of the trustee as the person to whom the trust estate has descended. The *cestui que trust*, being in possession and resisting the claims, is from necessity a party defendant, and, being interested in the trust estate, has a right to be a party in a suit the object of which is to settle the account of the trustee of his estate under the will of William T. Smith, the testator, and to ascertain whether it has paid, or still continues chargeable with, the payment of the excess of its value over that of the other shares. This is the object of the present suit; and it appears unnecessary to have before me the other devisees; for, the testator having fixed the value of the one third of the Delaware land devised in trust to Samuel Richards, the only matter essential now to be determined is the fact of payment, and this will require, as prayed for in the bill, a settlement of the trust account; and for this purpose, and also in reference to the estate alternately chargeable for whatever may be found due, it is evident that all necessary and proper parties are before the Court.

Opinion :—excess of share, where to be ascertained.

Considering the proper parties to be before the Court I shall now proceed to examine the next ground of defence, which is somewhat blended with the first; and, if substantial, would render the former available. It has been insisted that the amount of the excess of William's share over that of the other devisees ought to be determined in this Court, where the jurisdiction over the trust exists, and that such jurisdiction cannot be exercised by the Court in Pennsylvania. If such be the duty of this Court, then it is obvious its action must embrace the entire estate of the testator; and all the devisees entitled under the will, and who are interested in the settlement and distribution of that estate, would necessarily have to be parties. But it appears to me that the law of domicile applicable to this case excludes the jurisdiction of this Court in reference to the personalty and to all matters arising under the will, except so much thereof as applies to the trust estate in Delaware, which, being real estate, is subject to the *lex rei sitæ* and not the law of domicile. The testator has, in his will, fixed and determined the value of the one third of the Delaware estate; and, therefore, its excess when added to the property in Pennsylvania is a result consequent upon the action of the tribunal of the place of the testator's domicile, in the legitimate exercise of its jurisdiction, as the testator knew and intended it should be. Hence, I conclude it would not only violate the established law of domicile but be contrary to the intention of the testator, under the circumstances of this case, for this Court, to attempt either the settlement or distribution of the estate of the testator, William T. Smith.

The question of excess, or the amount of that excess, is not and cannot be made a subject proper for consideration, or investigation and discussion, in this Court; nor is the same so presented in this suit. The bill seeks, not to establish the existence of the excess through the action of this Court, but its payment—the enforcement of the trust

assumed by the trustee in fulfillment of the intention of the testator, and altogether distinct from the executor's duties and obligations. In the latter capacity Mr. Richards was bound to settle and distribute the estate at and according to the law of domicile. But as trustee he could only account and be discharged from liability by the tribunal to which jurisdiction belonged, according to the *lex rei sitæ.* It is true, he might have paid and charged himself, as executor, with so much received from himself as trustee; but, until he did so, the Orphans Court of Pennsylvania could not consider any portion of the trust property as constituting any part of the funds in his hands as executor. That Court, therefore, did, in passing upon the executor's account, reject and exclude altogether the matters connected with the trust estate in Delaware. The Court did right; and I am well satisfied that this Court possesses jurisdiction over the trust of the land in Delaware.

The settlement of the personal estate and the adjustment and distribution of the testator's estate being made in Pennsylvania, the State in which the testator was domiciled at the time of his death, the record of the Court having, and which exercised, jurisdiction thereupon has been exhibited, duly authenticated, as evidence of the amount of the excess claimed in this suit as due and payable to the administrator d. b. n. c. t. a. of William T. Smith. It is received as proving the fact of excess, and the amount of it, and also that the executor in the said account has not been charged with any part thereof as received from the trustee or the trust estate, but not as having any other effect. The accountability and the liability of the trustee are questions independent of the proceedings of which that record is evidence.

The defendants insist that the land they now possess and occupy ought not to be charged, inasmuch as the

Opinion :—obj'n that excess should have been collected from tenant for life.

trustee has received of the trust fund, and has not accounted therefor, sufficient to pay, and ought to have paid, the amount of the excess; and further, if he has not, then having neglected it until the estate for life has expired, he can now have no equity as against those entitled to the estate in remainder. The complainants, in reply to this, rely upon that part of the will which directs the trustee to permit the tenant for life to take and receive the rents, issues and profits. But the defendants contend that this must be taken subject to the proviso which, in case of excess, directs the payment thereof within six months after the decease of testator, and *prò tanto* diminishes the amount or value of the devise, and consequently leaves the right of *cestui que trust* only applicable to the rents and profits of the residue. The proviso applies to the *corpus* or entire value of the substance or estate devised, and not the rents and profits thereof. The entire *corpus*, if the excess had been taken from it, would have passed thus diminished, on the expiration of the life estate, to the person in remainder. This not having been done he holds it entire and undiminished. Is he entitled, so far as the principal is concerned, to retain the entire estate because the trustee has neglected or omitted to make the payment as prescribed at the time appointed by testator? Shall the *cestui que trust* derive a benefit from the default of his trustee, and, claiming under the will, hold against its provisions more of the estate in value than was devised in remainder? for he has it all, and it is not pretended that any portion of the substance or integral part of the estate estimated at $20,000 has been applied to the payment of the excess. But it is alleged in defence, that the trustee, by holding the possession, recovered enough of the rents and profits to make payment. If this be so, it would exonerate the land, provided payment can be obtained from the trustee; if not, the testator has charged the estate devised. He gave authority to the trustee to pay, and placed him in a

situation to do so; but, further, he has also provided that the land devised shall be charged and chargeable. If he had not devised to a trustee to pay, but had devised to his son William to pay the executor, and then declared the land devised charged and chargeable, the son, taking the land and receiving the rents and profits and failing to pay upon his death as tenant for life, and the entire estate in remainder so charged vesting in those entitled to the remainder, could they resist the claim of the principal because the tenant for life had not paid all out of the rents and profits, when the entire substance of the estate out of which payment was to be made had come to them undiminished and entire? But the unpaid interest would present a different question; and, the executor omitting to collect the same, it may with propriety be said that the remainderman has a strong equity on which to rely for being exempt from all interest except such as has accrued since he came into possession.

But it is said the charge on the land is discharged by lapse of time, no suit having been instituted nor any mode adopted for enforcing payment until twenty years had expired. The same person being executor and trustee may be considered an answer to this ground of objection. The same hand that was to pay had the right to receive; and this so continued up to the time of the death of Samuel Richards, in 1842; therefore, during that period the remedy by any adversary proceeding was not available.

Again, it is argued that the proceedings in partition had the effect of discharging the trust, and that by virtue thereof the rights of the parties were changed, and the trustee, having permitted the same to progress, was thereby concluded; and, therefore, the claim, as now presented, cannot be enforced. The record of the first case in partition discloses the fact that the trustee was in possession, and up to December, 1816, received the rents, and

Opinion :—as to remedy of devisees against executors.

was, therefore, liable to account; but it does not exhibit sufficient to warrant the conclusion that the whole sum due was actually received; for the trustee expressly asserts the contrary, and insists on his right to retain the possession on that account; and, in that case, the proceedings were not consummated. In the second case partition was made, but not so as to determine the trust, which it was not competent to affect. The proceeding, then, had only ascertained and defined the parts to be held in severalty, and thereby terminated the tenancy in common, but it left the trust estate subject to precisely the same trust as before, and the liability thereof under the will unaffected.

Further, it is insisted that the other devisees had their remedy under the will, and that having neglected it, they have now no right to seek to enforce payment against the land charged. The answer to this objection may be found in the fact that they are not so acting. They are asserting, from all that appears in this case, their rights to hold the executor liable elsewhere; and the parties responsible to them are here asking to have done what the executor did not, as they say, accomplish in his lifetime, viz: the payment by the land of the excess charged on it, the trustee having failed to pay. The omission and the delay are by the complainants said to be fully explained and accounted for by the *lis pendens* and the uncertainty thereby in which the amount of the excess of value was involved. The long and protracted controversy precluded the trustee from paying, as trustee, to himself as executor, until the final determination ascertained and definitely fixed the true amount or excess of value. The same person being trustee and executor, although he might have held in his hands as trustee the amounts, yet he could not with propriety mingle with the items involved in that controversy which concerned the personal estate exclusively any matters which appertained to his duty as trustee of the real estate in Delaware; especially, when the extent of the

Opinion :—conclusion.

liability of the trust estate was to be ascertained and determined by the previous and final settlement of the executors' account. But, further, it may be said the trustee could not carry into that account in Pennsylvania, in his character as trustee, his receipts or disbursements as trustee; nor was the jurisdiction, acting on the executors' account, competent to act upon the account of a person who was trustee of lands in Delaware. The proceedings in Pennsylvania were confined to the personalty, and have, upon the subject matter within the jurisdiction of the courts of that State, determined all controversy and finally concluded the parties, so that it now appears what were their shares of the personal estate, and the amount of the excess is thereby ascertained, pursuant to the will of testator. The record of the case, exhibited and duly authenticated, fully establishes the above facts, viz: the shares of each and the excess of the value of such as did exceed the one eighth of testator's estate. With this branch of the case I therefore consider this Court as having neither original nor revisory power, but bound to consider it determined by the law of domicile. It, therefore, being apparent that the share of William T. Smith Jr. exceeded the one-eighth of the testator's estate by the sum claimed by the administrator d. b. n. c. t. a, one of the parties complainant, and that the same has never been paid to or charged in the account of the executor of the testator, it follows, as a necessary result, that the other owners, devisees who could only receive their proportions through the executor, whose action thereon would be requisite to apportion and pay the same, have not been paid; and they not being the persons to claim from the land, except through the executor, therefore ought not to be deprived of their right to the one eighth of testator's estate because the trustee has failed to pay the same to himself as executor. They are clearly entitled to receive the amount of the excess, when the same shall have been carried into and

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made a part of the personalty, in aid of the deficiency of the testator's personal estate to make their shares equal to the one-eighth of the whole. But, as the trustee may have received, during his possession, more than, or enough to pay, the principal and interest, an account should be taken and the action of this Court had upon the trust created, under the will, of the land in Delaware.

Decree for an account.

BENJAMIN BURTON,

vs.

ISAAC T. ADKINS AND LOT INGRAM.

Sussex, Sept. T. 1846.

The complainant and the defendant, A. entered into a parol contract for an exchange of lands—the complainant agreeing to convey a tract of woodland and pay $800.00 in cash—the defendant, A. agreeing to convey, together with his wife, a tract of marsh, the title to which was held by the wife. Possession was mutually delivered. It was agreed that the parties should meet at the house of G. F. to execute conveyances; but such meeting was delayed and never took place. The defendant, A. cut off the timber from the woodland delivered into his possession under the contract. Afterward the defendant, A., without any tender of performance on his part, or demand upon the complainant for the execution of the contract, sold and conveyed the marsh to the defendant, I. On bill filed by the complainant for a specific performance,

Held, that the defendant, A. was not entitled to abandon the contract and to re-sell the marsh, without first tendering to the complainant a deed

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for the marsh and demanding performance on his part; that, under the circumstances, the complainant was not in laches.

Held further, that the defendant, A. was not entitled to abandon the contract, after having cut the timber off the woodland and thereby substantially destroyed its value, so that the complainant could not be placed *in statu quo*.

BILL FOR A SPECIFIC PERFORMANCE OF A PAROL CONTRACT FOR THE CONVEYANCE OF LANDS.—In August, 1841, the complainant and the defendant, Adkins, entered into a parol contract for an exchange of land, situated in Sussex county—the defendant, Adkins, agreeing to convey to the complainant a tract of marsh containing fourteen acres, and the complainant agreeing, in consideration of the marsh, to convey to the defendant, Adkins, four and-a-half acres of woodland, and also to pay additionally the sum of $300.00 in cash. It was understood that the parties, together with their wives, were to meet at the house of George Frame, a conveyancer, who was designated as the person to draw the deeds for the conveyance of title. No day for this meeting was specified; and, from one cause and another, it was delayed and never took place. Meanwhile, the parties respectively entered into possession of the land each was to take in the exchange. The complainant took possession of the marsh and cut the grass therefrom; the defendant, Adkins, entered upon the woodland and cut off the timber. The cash payment of $300.00 was to be made to the defendant, Adkins, upon the execution of a deed by himself and wife for the marsh, the title to which was in the wife. No tender of a deed by either party was afterward made or demand of performance on the part of the adverse party. Under these circumstances the defendant, Adkins, treated the contract as abandoned, and on the 15th of June, 1843, he and his wife by deed conveyed the marsh to the defendant, Ingram, thereby disabling himself from executing his contract to convey the same to the complainant.

The bill alleged the above state of facts and that the

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defendant, Ingram, had purchased with knowledge of the complainant's equity. The complainant tendered himself ready to convey the woodland and to pay the cash sum of $300.00, according to the contract; and he prayed for the specific performance thereof on the part of the defendant, Adkins, by a decree that the defendant, Ingram, in whom the legal title to the marsh was vested by the deed from Adkins, should convey the same to the complainant.

The answer of the defendant, Adkins, admitted the making of the contract, and its terms, and also the mutual delivery of possession, as alleged in the bill; but it insisted, by way of defence, that the complainant had been guilty of laches in neglecting to execute a deed for the woodland and to pay the $300.00, according to the contract; in consequence of which delay the defendant, Adkins, was entitled to treat the contract as abandoned, and to sell the marsh land to Ingram. The answer also alleged, as an additional defence, that the complainant's title to the woodland had become encumbered by sundry liens.

The answer of the defendant, Ingram, admitted that he purchased the marsh with knowledge of the contract between the complainant and Adkins.

The cause was put at issue and a deposition was taken of one witness on the part of the complainant, who testified that on one occasion he heard the defendant, Adkins, request the complainant to delay the execution of a deed.

The cause came before the Chancellor, at the Sept. Term, 1846, for a hearing on the bill, answers, exhibits and depositions.

J. W. Houston, for the complainant.

There has been no laches on the part of the complain-

ant. The contract fixed no time for the conveyance of title; and but a short time elapsed between the making of the contract and the sale to Ingram. Meanwhile, no demand had been made upon the complainant by Adkins, or tender of performance upon his own part; but, on the contrary, it is proved that Adkins himself requested delay.

With respect to the liens upon the complainant's title they present no obstacle to a specific execution of the contract. They consist of judgments entered since the contract was entered into, and their lien is subject to the defendants' equity in the woodland. A conveyance to the defendant, under a decree, would pass a title clear of such liens.

E. Wootten, for the defendants, insisted that, under the circumstances, there had been gross negligence on the part of the complainant; also, that the effect of the judgments was to make a doubtful title in the complainant, which the defendant, Adkins, was not bound to accept. *Sugden on Vendors* 244; *Jeremy's Equity* 448 (*margin*, 449); 4 *Ves. Jr.* 686.

JOHNS, JR., CHANCELLOR.—The case should be considered with reference to the state of things existing at the time of the sale to Ingram. For, from that period the defendant, Adkins, by the deed from himself and wife to Ingram, disabled himself from any execution of his contract with the complainant. It is, therefore, only necessary to consider whether, anterior to such conveyance to Ingram, the complainant had been guilty of gross negligence by the omission to execute a deed from himself and to pay the $300.00. Such negligence justified Adkins in abandoning the contract.

It is evident that, under the contract, the complainant was to hold the $300.00 in consequence of the title to the

marsh being in the wife of Adkins; and that he was not bound to pay this cash sum, or to execute a deed on his part,until the title to the marsh should be conveyed to him, or until, at least, a tender of such conveyance should be made. Until such conveyance or tender by the defendant, Adkins, the complainant, could not be in laches. Had Adkins and his wife executed such conveyance and tendered the same to the complainant, with a demand for performance on his part, or, what would have been better, had they deposited such conveyance in the hands of Mr. Frame, as an escrow, to be delivered on payment of the $300.00 and the execution and delivery of a deed by the complainant for the woodland, and had the complainant thereafter refused or neglected to accept such conveyance and to execute the contract on his part, by conveying the woodland and paying the $300.00; and further,had this defendant not so materially altered the condition of the property accepted by him in part execution of the contract, as he has done by cutting off the timber, in a great degree destroying its value—under such a state of facts, he might have been entitled to declare the contract abandoned and to re-sell his own land. But, under the present state of facts, a court of equity cannot hold him justified in that course, both because he had not himself, before the re-sale to Ingram,tendered performance of the contract on his own part or taken the usual and proper steps to obtain its execution by the complainant; and, additionally, because, having cut off nearly all the timber, it would be against equity and good conscience to allow him to repudiate the contract, after he had himself gained such substantial benefits under it, and so altered the condition of the land delivered to him as not to be able to put the complainant *in statu quo.*

Under all the circumstances this is a clear case for equitable relief. The complainant has not been guilty of laches, such as to forfeit his right to a specific perform-

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ance; and his equity is strongly enforced by the condition in which the defendant has placed the woodland; so that to deny him relief would be practically to leave him deprived both of the benefit of the contract and of all that was substantially valuable in his own property—and that without any laches on his part.

The defendant, Ingram, having purchased with knowledge of the contract, took his title subject to the complainant's equity.

Let a decree be entered according to the prayer of the bill.

PETER R. BURTON,

vs.

JAMES DUFFIELD AND RHODA, HIS WIFE.

Sussex, Sept. T. 1847.

The owner of a tract of land let the complainant into possession thereof, promising to give it to him; and upon the faith of such promise the complainant built upon, improved and occupied the land. The owner died without having conveyed the same. The complainant was held entitled to be protected in equity against an ejectment, brought by the heir at law, to recover possession of the land.

BILL IN EQUITY to compel the conveyance of land, under the following circumstances:

Thomas Robinson, deceased, in his lifetime and in the year 1843, had at sundry times declared, both to the com-

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plainant and to other persons, his intention to give the complainant five acres of land; the same to be laid off from a certain part of a larger tract owned by Robinson. The five acres were marked off and separated from the farm by a designated boundary. Pursuant to this intention of Robinson, and with his consent, the complainant went into possession of the five acres, built a house upon the land, and otherwise improved it; expending, in such improvements, about $800. The complainant was a nephew of Robinson, who, having no children, had adopted the complainant. He had shown great interest in the complainant; had educated him; and had, after the majority of the complainant, taken him into partnership with him in business; and they were co-partners at the time of the transaction referred to. The complainant had some funds, which, at the time of his majority, were in the hands of said Burton, as his guardian, and were retained by him as part of the capital of the partnership. About three years prior to the transactions before referred to, Robinson had made a will; but, not having then acquired a title to the tract from which the five acres were laid off, he died intestate as to the land in controversy. He died in October, 1843, without having made any conveyance of the five acres to the complainant, although he had promised the complainant and intended to do so. After his death the defendants, in right of the defendant, Rhoda Duffield, as the heir at law of Robinson, claimed to be entitled to the five acres, and brought their ejectment to recover possession. The bill, setting forth the above facts, prayed an injunction to restrain the action of ejectment or any other action to recover possession, and that the defendants might be decreed to convey to the complainant the legal title to the premises.

The answer of the defendants admitted the alleged relationship of the complainant to Thomas Robinson, and that Robinson had educated him and taken him into part-

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nership; but the defendants did not know whether Burton acted in the partnership. It further admitted that Robinson intended to devise the land in controversy to the complainant, but died without doing so; that the title descended to his heir at law, the defendant, Rhoda Duffield; that Robinson had, by his will previously made, devised a large part of his other real estate to the complainant. The answer denied that there was any gift of the land by Robinson to the complainant, or promise of such gift, or that he expended money in making the improvements; it alleged that Robinson furnished the building materials from his saw mill, boarded the hands, and provided what funds were necessary; and the defendants did not believe that Robinson charged the complainant for such materials and expenses; and that, even if so charged, the complainant was then a minor and not legally liable.

Depositions were taken on both sides. It was proved, on the part of the complainant, that, while the improvements were being made, Robinson said that he had given, or that he intended to give, the land to the complainant. It was also proved that he had put a worm fence across the whole tract, separating the part on which the improvements were put; and that he said he had given that part of the land to the complainant; that the complainant took possession of it and caused the buildings to be erected; that he paid for the work done; that Robinson, on sundry occasions, refused to pay bills for the work; that Robinson furnished the lumber, but charged the complainant for it on his books of original entries; as was proved by the production of the books. The complainant, after the improvements were made, moved upon the premises and held them at Robinson's death.

The cause came before the Chancellor, at the Sept. T. 1847, for a hearing upon the bill, answer, exhibits and depositions.

Argument.

C. S. Layton, for the complainant.

The defendants can stand in no better condition than would Robinson, were he living. 1 *Johns. Ch. Rep.* 131; 16 *Ves. Jr.* 249; 1 *Fonb. Eq.* 169, 177, 178. Now, against him the complainant's equity would be unquestionable. Independently of any contract, such an equity arises out of the principle of equitable estoppel. Where one stands by and sees another purchase land to which he has title but does not assert it, the purchaser acquires an equity against him. 9 *Mod. Rep.* 36, 39; 1 *Sch. & Lef.* 120; 3 *Mer.* 235; 1 *Swans.* 181; 2 *Bro. Ch. R.* 417; 1 *Keen.* 421. 431; 1 *Chitty's Eq. Dig.* 473; 2 *Freeman*, 268; 1 *Madd. Ch. Pr.* 880, 381; 2 *Vernon*, 455; *Pr. Ch.* 516; 1 P. *W.* 772 *note* 1; 1 *Ball & Beatty*, 181. The same principle has been ruled as applying to the very case of a person who stands by and, without objecting, sees another build upon his land. He is bound thereby. 2 *Atk.* 82; 12 *Ves. Jr.* 35.

E. D. Cullen, for the defendants.

In this case there is little for argument. The principle that a mere voluntary promise raises no equity has been already decided in our Court of Errors and Appeals, in *Carlyle's case*, 1 *Harring. Rep.* 421. See also 1 *Sto. Eq. Jur.* 376, 378; 4 *Mass. Rep.* 418.

J. W. Houston, in reply.

It is true, that a mere voluntary promise, without more, is not enforced in equity; yet it is otherwise where, as in the present case, the party to whom the promise was made has acted upon it, by paying money, or even by entering into engagements. The breach of such a promise is a fraud, and on that ground equity will relieve him.

Opinion.

The present is a very strong case of that class. Possession was delivered and improvements made; and to withhold now the legal title from the complainant would operate as a gross fraud upon him. *Roberts on Frauds*, 129—135, 149—152; 1 *Chitty's Eq. Dig.* 473.

JOHNS, JR., CHANCELLOR.—The complainant is entitled to relief, on the ground that upon the faith of Robinson's acts, in giving him possession of the land with a promise of the title, he was induced to build the house and make the improvements. Robinson's acts were unequivocal, and such as to warrant the complainant's confidence. He marked the five acres off, separated them from the rest of his land by a visible boundary, and put the complainant into exclusive possession. The accident of his death alone prevented him from perfecting the legal title by a deed. The land has descended to the defendant, Rhoda Duffield, subject to the equity of the complainant, arising out of these transactions; and the complainant is entitled to be protected.

A decree was entered that the defendants convey to the complainant, his heirs and assigns, the land in controversy; also that they be perpetually enjoined from further prosecuting the ejectment, or any other process to recover possession of the premises.

Statement of the case.

PAYNTER JEFFERSON,

vs.

GEORGE TUNNELL, CHARLES TUNNELL, ISAAC H. HOUSTON AND JOSEPH KOLLOCK.,

Sussex, Sept. T. 1847.

Sureties, not having paid the debt for which they are bound, are not creditors of their principal.

The surety's liability for his principal is not a valuable consideration, as against creditors of the principal, for a bond conditioned for the payment of a sum of money as a debt.

G. T., a guardian, being indebted to his ward, at the solicitation of his sureties, gave his judgment bond to three of them to indemnify them and their co-sureties; and, for the same purpose, assigned to them certain debts, which debts the sureties collected and held for indemnity. *Held*, that the transaction was fraudulent and void, as against creditors of G. T. afterward recovering judgment.

It seems, that sureties in administration, testamentary and guardian bonds, having a statutory remedy in the Orphans Court for counter security, cannot seek indemnity in a court of equity.

BILL TO SET ASIDE AN ASSIGNMENT.—This bill was filed by the complainant, for himself and such other creditors of George Tunnell as should intervene. The complainant, on the 1st of January, 1841, had sold and conveyed to George Tunnell certain real estate, for which Tunnell paid in cash $75, and gave his judgment bond for $700, payable, July 1st, 1842. Judgment was entered on the bond, August 18th, 1842. On the 16th of August, 1842, two days before the complainant's judgment was entered, George Tunnell assigned to Charles Tunnell, Isaac H. Houston and Joseph Kollock, who, with nine other persons, were George Tunnell's sureties in certain guar-

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dian bonds, all his estate, real and personal, in trust for the indemnity of the sureties, with a provision that any remaining balance should revert to George Tunnell. He also, at the same time, executed to the same persons a judgment bond for $15,000, absolute upon its face, but subject to the same trusts—on which bond judgment was entered, the same day. On the 3d of March, 1843, the assignees, having elected not to hold the real estate under the assignment but to proceed against it under their judgment, reconveyed it to George Tunnell, retaining the personal property. Afterward, the whole of the property which had been assigned, real and personal (including the real estate which the complainant had sold to George Tunnell), was levied upon and sold to satisfy the judgment for $15,000; and the property so sold was chiefly purchased by the assignees, Charles Tunnell, Isaac H. Houston and Joseph Kollock; who also collected and received sundry judgments and other credits to a large amount, which they had taken under the assignment.

The bill charged that the assignment, as also the judgment bond for $15,000, were without consideration, inasmuch as the parties for whose benefit they were executed were not creditors but only sureties who had as yet paid nothing; and that they were void as against creditors. The bill also charged that, even were the assignees creditors, the assignment and judgment bond were given in contemplation of insolvency and created an illegal preference, contrary to the insolvent laws. It, therefore, prayed an account of the property of George Tunnell received under the assignment and of the money collected under the judgment, together with the rents of the land, &c. Also, the bill prayed a decree for the payment of the complainant's judgment; that the assignment and the judgment given to the assignees in trust might be declared to be fraudulent and void, and the defendants be perpetually enjoined from proceeding under them; also that a reconveyance of the lands might be ordered.

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The answer denied the alleged fraud, and insisted that the assignment and the judgment bond for $15,000 executed to indemnify the sureties were legal; that the sureties stood liable for large balances on Tunnell's guardian accounts, and had, since the said assignment was made, paid the sum of $2,897.30; that the assignment and bond were executed while Tunnell was solvent and without any expectation of insolvency. The answer also insisted upon the long delay of the complainant in entering judgment on his bond as a bar to aid in equity.

The cause came before the Chancellor, at the Sept. T. 1847, for a hearing upon the bill, answer, exhibits and depositions.

McFee and *Layton*, for the complainant.

E. D. Cullen, for the defendants.

JOHNS, JR., CHANCELLOR.—In this case I must decree in favor of the complainant, he being a *bona fide* creditor of George Tunnell, and against the defendants, they not being creditors, but only sureties.

I consider the sureties incapable of taking the bond on which their judgment was entered and the property of the principal, both personal and real, sold by virtue of execution process issued thereon, in payment of a debt claimed as due and payable, to the amount of $15,000, when, as sureties, they have not paid the same or any part thereof; for, until payment, the surety is not a creditor, and there can be no debt due from the principal to his surety; therefore, the simple liability as surety cannot constitute a valuable consideration for a bond conditioned for the payment of a sum of money as a debt. I agree with the case of *Waters vs. Comly*, decided in the Court of Errors and Appeals, 3 *Harring. R.* 117, that a debtor has a right to give his creditor a bond for a debt *bona fide* due or existing

at the time of executing the bond, or to secure the payment of the same by a judgment confessed; but it does not extend to the giving of a bond or confessing of a judgment by a principal to his surety when there is no debt due. This bond, for the want of a valuable consideration, being invalid in relation to the rights of the *bona fide* creditors of the principal, the judgment entered thereon and the execution and sale cannot be, as against creditors, sustained or held in any respect, in equity, as effectual.

I am aware that the liability of a surety constitutes a good and sufficient consideration for a bond of indemnity, with a collateral condition, under which the sureties might secure by judgment a lien on the real estate of the principal, which, on any damage ensuing to the surety, or payment made by him and legally ascertained, might be rendered available; but the fact of the payment of damage would have to be determined, upon breaches assigned, and by verdict or inquisition, before execution could issue against the principal or his property. This mode of securing indemnity to sureties benefits the surety, and never can prejudice the creditor for the payment of whose debt the surety is liable; since the surety can only reach the property of the principal after he has paid the creditor, and thereby, to the extent of such payment, stands in the place of the creditor; and it may also prove beneficial to the creditor; for if a lien be secured by judgment on such bond, so as to bind the land of the principal, and the same be also subject to the lien of subsequent judgments, the creditor might be entitled to obtain the advantage resulting from the priority of liens; and such lien would thereby be applied to discharge the debt of the creditor out of the property of the principal or debtor.

Considering then that these sureties cannot stand upon the bond and the judgment entered upon it, is there such an equity on their part as the Court can regard and

protect, against the property of the principal which has come to their hands? It does not appear to me that the general equities of sureties are such as to reach this case. After payment, sureties are entitled to relief in equity by contribution from the co-sureties, or after default and when in danger of sustaining loss, they have a remedy by bill filed for indemnity; but the principle of indemnity would not sanction a court of equity in decreeing payment of the debt to a surety, or that the principal should become the debtor of his surety by bond or obligation. Besides, the relief, in a court of equity, of sureties *in administration, testamentary or guardian bonds*, by affording indemnity against the principal, seems to be precluded by the Act for establishing courts of law and equity within this government, Sec. 25, (*Dig. Del. Laws* 103,) which provides, "that nothing herein contained shall give any power or authority to hear, decree or determine in equity any matter, cause or thing wherein sufficient remedy may be had in any other court or before any other magistrate or judicature in this Government, either by the rules of the common law *or according to the tenor and directions of the laws of this Government;* but that when matters determinable at common law shall be brought before them in equity they shall refer or remit the parties to the common law." Now, we have an Act of Assembly conferring jurisdiction over the matter of counter security by executors, administrators and guardians upon the Orphans Court; and the remedy there provided is summary and in every respect ample, according to the tenor and direction of the laws of this Government. It seems, therefore, a necessary consequence that the Court of Chancery in this State has no power or authority to hear, decree or determine in equity any such matter.

I must consider that the assignment, in view of all the circumstances under which it was taken and abandoned, the reconveyance by the trustees, followed by the giving of

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a bond and execution to the same persons, they not being creditors, and the sale and application of George Tunnell's property to the use and benefit of persons not having any debt due, were all fraudulent in respect to the complainant—a *bona fide* creditor of the said Tunnell—as well as in respect to other judgment creditors of Tunnell.

' Let a decree be entered that the assignment, bond and judgment be declared fraudulent and void, as against the complainant and the judgment creditors, and be set aside; and that the assignees pay into Court for the benefit of the complainant's other creditors who shall come in, $3,098.26, with interest, being the money collected and proceeds of sale of the property of George Tunnell.

This decree was reversed by the Court of Errors and Appeals at the June T. 1849, so far as it held the assignment, bond and judgment of George Tunnell to his sureties to be altogether fraudulent and void. The appellate Court held the assignment, &c., to be valid as against creditors generally, though subject, as to the proceeds of the real estate, to the complainant's lien for purchase money, which his judgment was given to secure. A decree was entered for the payment of the complainant's judgment out of the assigned estate, the residue to be held for the indemnity of the sureties; and any surplus, after such indemnification, to be distributed among the other creditors of Tunnell. 5 *Harring. Rep.* 206.

Syllabus.

THE STATE OF DELAWARE,

vs.

JOHN W. MAURY, KENDAL M. LEWIS, STEPHEN GREEN, and WILLIAM TUNNELL.

New Castle, Sept. T. 1851.

A court of equity has jurisdiction of a bill filed to restrain the further drawing of a lottery, under color of an Act of the General Assembly authorizing a lottery for raising a certain sum of money, upon the alleged ground that certain pre-requisites to the exercise of such authority, prescribed by the act, have not been complied with, and also that the authority granted has been exhausted by the drawing of lottery schemes competent to raise the required sum. Such irregular or excessive drawings is a breach of the trust confided by the act, and as such is remediable in equity. The Court has also jurisdiction for the purpose of discovery, in order to ascertain whether the authority granted has been exhausted.

By an Act of the General Assembly, certain trustees were authorized to appoint a manager or managers, to institute, carry on and draw a lottery for raising a sum not exceeding $25,000, to be applied to certain public objects; the manager or managers to give bond to the State with surety to be approved by a Judge, conditioned for a faithful performance of duty in the sale of tickets and drawing of the lottery, and in paying over to the trustees, or their successors, the net proceeds thereof. All expenses were by the act directed to be paid out of the proceeds of the lottery, and the net proceeds to be paid over to the trustees, to be by them applied to the purposes of the act. A bill was filed, alleging that the trustees had exceeded their authority under the Act, by undertaking to enter into a contract to grant to certain managers, appointed by them, the privilege of drawing a lottery for a term of years, in consideration of an anuual sum, to be paid to the trustees for the purposes of the act; also alleging that the managers appointed had failed to give bond in conformity with the provisions of the act; also alleging that the managers had exhausted their authority under the act by drawing more than the sum required—*Held*, that upon such a bill a court of equity has jurisdiction to restrain the further drawing of the lottery.

Statement of the case.

Indictment under the general act against the illegal drawing of lotteries is not an adequate remedy, such as to oust the jurisdiction of a court of equity—an indictment being *punitive* only and not *preventive*.

The drawings being made under a license granted, and being invalid for irregularity only, neither an indictment nor a writ of *quo warranto* would lie. Adequate relief can be had only in a court of equity.

An agent or trustee, when called to account under a bill in equity for an irregular or unauthorized exercise of powers, cannot object to making discovery of his transactions, on the ground that they are such as may subject him to a criminal charge, the object of the bill not being to enforce a criminal liability, but only to restrain from further unauthorized acts.

BILL FOR AN INJUNCTION TO RESTRAIN A LOTTERY.—By an act of the General Assembly, entitled "An Act for the benefit of Sussex County," passed February 13th, 1835,* three trustees were appointed, with power to elect or appoint one or more persons, not exceeding five, as managers,

* The material provisions of the act referred to are as follows:—

SEC. 1. *Be it enacted &c.*, That William D. Waples, Philip Short and Robert H. Griffith, of Sussex County, be and they are hereby appointed trustees, for the purpose of carrying into effect the objects of this act; and it shall and may be lawful for the said trustees, or their successors. at any meeting to be held by them at Georgetown, in said county, after the passing of this act, and by a majority of votes of the said trustees who shall then be assembled, to elect and appoint one or more person or persons, not exceeding five in number, as manager or managers, to institute, carry on and draw a lottery, in one or more classes, for raising a sum not exceeding twenty five thousand dollars, clear of all exepenses, costs, charges, &c.—(The section proceeds to appropriate the fund.)

SEC. 3. *And be it further enacted*, That the said manager or managers previously to the publication of any scheme and the sale of any tickets in said lottery, shall give bond to the State of Delaware, in such sum and with such security as any one or more of the Judges of the Superior Court shall approve of, conditioned for the true and faithful performance of the duty of the said manager or managers in the sales of tickets, drawing the classes of said lottery, paying the prizes, paying over to the said trustees, or their successors, the net proceeds of said lottery, and managing all the business thereof.

SEC. 6. *And be it further enacted*, that all expenses necessarily attending the carrying of this act into effect, so far as relates to the instituting, carrying on and drawing said lottery, shall be paid by said manager or managers, out of the proceeds thereof.

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to institute, carry on and draw a lottery, for raising a sum not exceeding $25,000, for certain public objects in the act specified. On the 11th of March, 1837, William D. Waples, Philip Short and David Hazzard, then being the trustees, appointed Dudley S. Gregory manager of said lottery; and the trustees, assuming to act under the authority of the act, entered into a contract with Gregory to sell to him the privilege of drawing the lottery for a certain term of years, in consideration of $25,000 (the sum authorized to be raised) to be paid by him to the trustees, in certain annual installments, during the term limited for drawing the lottery. Gregory proceeded to draw the lottery, and during the time of his drawing paid to the trustees the gross sum of $8,000. Upon the 1st of July, 1841, he declined further to draw; and, thereupon, the trustees appointed James G. Gregory and Daniel McIntyre, managers, to draw the lottery; and the trustees also entered into a contract to sell and assign to them the privilege of drawing for a certain other term of years, in consideration of their paying to the trustees, in certain annual installments, the unpaid residue of the sum of $25,000, authorized by the act to be raised. Under this grant, Gregory and McIntyre proceeded to draw the lottery, and during the time of their drawing paid to the trustees the further sum of $7,875.00. On the 1st of January, 1847, Gregory and McIntyre declining further to draw, the trustees appointed Benjamin P. Gregory and John W. Maury, managers, to draw the lottery, at the same time entering into a contract to sell and assign to Gregory and Maury the privilege of drawing for a certain other term of years in consideration of their paying to the trustees, in certain annual installments, the unpaid residue of the sum of $25,000, authorized by said act to be raised.* Under this

* The contract of the trustees with Gregory & Maury, after setting forth the act of Assembly and the prior proceedings under it, proceeded to appoint Gregory & Maury managers of the lottery; and then stipulated as

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last grant Gregory and Maury proceeded to draw the lottery, and were so drawing when this bill was filed.

The bill contested the right of the present managers to draw the lottery, on several grounds, viz:

(1) That, although Gregory and Maury had been, in form, appointed managers, to draw only as agents for the State, according to the terms of the act, yet that in fact

follows *viz;* that the trustees, "for and in consideration of the sums of money hereinafter mentioned, as to be paid by the said parties of the second part, do transfer, dispose of, sell, assign and set over to them, the said Benjamin P. Gregory and John W. Maury, the full and exclusive power, authority, rights and privileges of instituting, carrying on and drawing the lottery by the said act authorized, in one or more classes, as they, in each and every year during the continuance of this agreement, from time to time may deem necessary and proper to draw, upon the combination or combination and permutation of numbers, or other fair plan. And the said parties of the first part do, by these presents, agree with the said parties of the second part, that this contract shall endure and continue for and during the full term and period of six years and three months from and after the first day of January, one thousand eight hundred and forty seven, unless sooner terminated or dissolved, as hereinafter provided. And the said Benjamin P. Gregory and John W. Maury, on their part, do hereby agree to assume the management of said lottery, and from and after the 1st day of January A. D. 1847, to pay to the said parties of the first part, and their successors, or to such person or persons as they may duly appoint, as the consideration for their appointment and for the sale and assignment of the full and exclusive power and authority to carry on and draw the said lottery, the just and full sum of $1460.00 in each and every year during the existence of this contract," &c.

There was a further provision, that "in consideration of the annual payments to be made by Gregory & Maury, they should retain for their own use the whole of the fifteen per centum to be deducted from the prizes; that they were to make the annual payments to the trustees, whether or not they should succeed in raising the same from the lottery clear of all expenses; also that they should retain for their own use all which they might raise from the lottery, over and above expenses and the annual payments to the trustees.

There were further stipulations on the part of the managers to pay all expenses, assume all risks, and to pay prizes drawn within twelve months after the drawing.

Statement of the case.

said Gregory and Maury were, under the contract between them and the trustees, drawing as grantees or assignees of the lottery privilege for a fixed term; that, instead of their being appointed to raise by lottery the limited sum of $25,000, for the use of the State, the several managers appointed had been empowered, under color of the act, to exercise the lottery privilege *ad libitum*, during the terms granted by the contract; and so were enabled to raise sums, unlimited in amount, for their own profit, paying to the State $25,000 as a consideration for the privilege—all which was contrary to the meaning and beyond the authority of the act.

(2) The bill alleged that by the act it was required that the managers to be appointed should, before proceeding to institute and draw the lottery, give bond to the State, with surety to be approved by one of the Judges of the State, and with condition for the faithful performance of their duties as such managers; and that they should pay over to the trustees, or their successors, the net proceeds of the lottery to be drawn—such bond to be filed in the office of the Secretary of State. Yet, the bill alleged that no bond, as required, was ever given by Dudley S. Gregory, the first manager appointed; that the second managers, although they began to draw from the date of their appointment, (July 1st, 1841) gave no bond until the 6th of May, 1843; that the present managers, Gregory and Maury, had, upon their appointment, given a bond to the State purporting to be in compliance with the act; but that the bond so given by them, and also the bond given by their predecessors, Gregory and McIntyre, were not in conformity with the requirements of the act, inasmuch as such bonds were not conditioned to perform faithfully their duties as such managers, and to pay over to the trustees, or their successors, the net proceeds of said lottery, but were conditioned for the payment over to the trustees, or their successors, of the sum specified as the consideration

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of the grant assumed to be made under color of said act.* And so, the bill charged, that the bond given by the present managers was invalid, and the drawings were, on that ground, illegal.

(3) The bill further charged that the lottery privilege granted by the act had been exhausted; that the act authorized only the institution and drawing of a single scheme of a lottery, in one or more classes; such scheme being competent, by the usual deduction from the amount of prizes therein, to yield the sum of $25,000, authorized to be raised; that it was the duty of the managers to abstain from drawing such scheme, or any class thereof, until all the tickets of such scheme or class should have been sold, the managers having no right to gamble or run any risk; that the only profit which could be legitimately made by the said lottery was by a deduction from the amount of prizes; and that the only charges and expenses to be incurred were the actual expenditures and the salary of the manager or managers; that the deduction from said prizes to an amount sufficient to raise the required sum of $25,000, after allowing the proper expenses incident to the institution and drawing of the lottery, together with the salary of the manager or managers, was the whole amount intended by the act to be raised by the lottery authorized. Yet the bill alleged that the managers had, under color of said act, proceeded to institute and draw, through a long

* The condition of the bond given by Gregory & Maury was as follows:— "That if the said Benjamin P. Gregory and John W. Maury do and shall, at all times during their continuance as managers of the said lottery, truly and faithfully perform their contract in all things relating to the same, which on reference to the articles of agreement between the trustees aforesaid and the said Benjamin P. Gregory and John W. Maury, dated this 10th day of December 1846, will fully appear; and especially pay all the prizes of all tickets sold in the several schemes, and pay over to the said trustees, or their successors, such sum or sums of money as they have agreed to pay, on the condition and in the manner they have agreed by the said contract to pay, then this obligation to be void," &c.

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series of years, great numbers of separate and independent schemes of lotteries, the prizes in which had amounted to many millions of dollars; that said schemes contained a stipulation for the deduction from the prizes to be drawn of fifteen per centum, the aggregate amount of which deduction from all the prizes contained in the schemes would make, after the most ample allowances for expenses and for the salary of the manager or managers, a very large sum of money, far exceeding the sum of $25,000, authorized by said act to be raised; that not only in contemplation of law had more than the sum so authorized been raised, by the drawing of schemes competent, by the sale of all the tickets, to raise a much larger sum, but that the sum of $25,000 had *in fact* been realized from the drawings, as the same had been made, clear of all costs, charges and allowances contemplated by the act; and so, as the bill charged, the authority granted by the act had been exhausted, and the further drawing of any lottery under color of said act was wholly illegal.

The bill prayed a discovery, in answer to the matters alleged,and particularly as to the number of schemes which had been instituted and drawn, the amount of prizes therein, the percentage stipulated to be deducted from prizes sold, and the expenses incurred in instituting and drawing such schemes. It also prayed a perpetual injunction against the further drawing of any lottery under the said act, and for general relief.

The answer of Kendal M. Lewis, Stephen Green and William Tunnell, the present trustees under the act referred to, admitted the passage of the act, the appointment therein of trustees and the substitution of trustees to fill vacancies, the several appointments of managers, and the execution of contracts with them for the drawing of the lottery, as in the bill was set forth. These defendants disclaimed any knowledge respecting the giving of bonds by

the managers under the first two appointments; but they alleged that a bond was duly given, as under the act required, by the last appointed managers, Gregory and Maury. They knew nothing touching the method of drawing, or the proceedings on the part of the managers, but believe the managers to have acted with fidelity and within the authority of the act; that there had been paid over to the trustees the gross amount of $21,845.00.

The answer of John W. Maury, the survivor of Gregory and Maury, admitted the allegations of the bill touching the passage of the act, the appointment and substitution of trustees, and the several appointments of managers. It set forth at large the contract executed between the trustees and the managers last appointed; also the bond given by the managers, and insisted that the contract and bond were within the meaning and authority of the act. With respect to the allegations of the bill that the act contemplated the institution of a single scheme competent, by the sale of all the tickets and the deduction of a percentage from all the prizes, to raise the required amount, the answer alleged that such method of drawing had been long abandoned; that the act, in providing for the appointment of managers, contemplated that persons engaged in the trade and business of drawing lotteries would be employed, and that the lottery authorized would be instituted and drawn in the modes established and practiced in the business, such as had been pursued by the managers under this act; that, according to the true intent and meaning of the act, the sums to be paid over by the managers under their contract with the trustees constituted the net proceeds of the lottery; and that there still remained to be paid to the trustees upwards of $3,000, in order to make up the amount of $25,000, authorized to be raised. The answer refused to make the discovery prayed for by the bill, touching the schemes which had been in fact drawn, protesting that such discovery might subject this defendant to penalties under

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the statute of this State declaring the unauthorized drawing of lotteries a misdemeanor. It submitted that this Court is without jurisdiction, inasmuch as the trustees, in their contract with the managers, exercised a power delegated to them by the Legislature, to which body alone they and the managers were responsible for their acts; also inasmuch as for any illegal drawing of lotteries there is a sufficient remedy at law by indictment.

Upon the filing of the bill the Chancellor granted a preliminary injunction. The answers being filed, a rule was laid upon the complainant to shew cause why the injunction should not be dissolved. Pending this rule, exceptions to the answers were filed—the exception mainly relied upon being to the refusal of the defendant, Maury, to make discovery touching the schemes which had been drawn under the act.

The cause came before the Chancellor on the 14th of November, 1851, for a hearing upon the rule to shew cause why the injunction should not be dissolved, and upon the exceptions to the answer. The argument at this hearing embraced three questions, viz: the jurisdiction of the Court, the sufficiency of the bond of the managers, and the obligation of the defendant, Maury, to make discovery touching the schemes drawn.

W. Saulsbury, Attorney General, with whom was *D. M. Bates*, for the State.

W. H. Rogers, *E. W. Gilpin* and *J. M. Clayton*, for the defendants.

JOHNS, JR., CHANCELLOR.—From the Act of Assembly, &c. which is the foundation of this suit, the bill of complaint filed and the answers of the defendants, must be ascertained the subject of controversy and the respective rights and remedies. These several matters, being understood

and defined, will determine the question of jurisdiction, and the appropriate remedy and mode of redressing any violation of the relative rights of the parties.

The first inquiry, therefore, must be directed to the Act of Assembly; as it confers the power and authority, and creates and vests the interests involved in the present suit. "The Act for the benefit of Sussex county" was passed for the purpose of raising, by a lottery, $25,000, clear of all charges and expenses; and this amount, as a net sum or proceeds of the lottery, is directed to be paid to the trustees named, or their successors, thereafter to be appointed by the Governor, and by them to be disbursed, according to the appropriation thereof made by the act.

The first section of the act appoints the trustees, and confers upon them the power or authority, at any meeting to be held by them, at Georgetown in the said county, after the passing of the act, and by a majority of the votes of the said trustees who shall then be assembled, to elect and appoint one or more person or persons, not exceeding five in number, as manager or managers, to institute, carry on and draw a lottery, in one or more classes, for raising a sum, not exceeding twenty-five thousand dollars, clear of all expenses, costs and charges. From this section, I understand the law confers upon the trustees the power of appointment of the manager or managers, and by prescribing the mode of its exercise, by election, thereby excludes every other. And, when thus exercised, the manager or managers thus appointed derive from the Act of Assembly power to institute, carry on and draw a lottery, in one or more classes, for raising the net sum authorized to be raised.

By the 2nd section of the act it is made the duty of the trustees to notify the Governor of the State, for the time being, the name or names of the person or persons who shall be elected and appointed manager or managers, pur-

suant to this act. From this section and the following, as also from the Act of Assembly not having conferred any authority or control over the manager or managers by the trustees, nor delegated to them any power or authority to institute, carry on or draw the lottery; or, as in other lottery grants, to sell such right or privilege, I consider the manager or managers, when appointed, as authorized by the act, which is a public law, and as deriving from it expressly and directly the power to institute, carry on and draw the lottery; and, therefore, the manager or managers can be regarded, in the discharge of their duties and the exercise of the delegated power, in no other light than as agents of the State. It is in consequence of their sustaining this relation to the State and the liability of the State for their acts, in the exercise of the authority granted, that provision is made, in the 3rd section, for the protection and indemnity of the State, and to secure to the State, on the part of the manager or managers, the true and faithful performance of the duty of the said manager or managers, by requiring that the said manager or managers, previously to the publication of any scheme and the sale of any tickets in said lottery, shall give bond to the State of Delaware, in such sum and with such security as any one or more of the Judges of the Superior Court shall approve of, conditioned for the true and faithful performance of the duty of the said manager or managers in the sale of tickets, drawing the classes of said lottery, paying the prizes, paying over to the said trustees, or their successors, the net proceeds of said lottery, and managing all the business thereof.

By the 6th section it is enacted that all expenses necessarily attending the carrying of this act into effect, so far as relates to the instituting, carrying on and drawing said lottery, shall be paid by the said manager or managers out of the proceeds thereof. The law thus, in this 6th section, expressly confers on the manager or managers

full authority to defray all expense that is or may be necessary to carry the act into effect, so far as concerns the lottery.

The 8th section directs the trustees to give bond, conditioned to account for all monies received and disbursed by virtue of this act, and faithfully to perform all the duties and trusts reposed in them; which bonds, and also those given by the manager or managers, are to be delivered to the Secretary of State and filed in his office; and may be sued by any person or persons in the name of the State, for his or their use, who shall be injured by the breach of the condition thereof.

The 9th section enacts that this act shall be deemed and taken to be a public act.

Before adverting to the case made by the bill and answer it may be well to consider and understand the effect and operation of the Act of Assembly.

It has, by name, appointed certain persons trustees, who, as such, have a right to receive the net proceeds of a lottery and disburse the same to accomplish certain public improvements; but they are invested with no other authority or control over the lottery except the power of appointing, by election, the manager or managers. They, as trustees, are not responsible for the acts of the managers by them elected and appointed; for such managers are not their agents and cannot be; for they, as trustees, have no power or authority conferred upon them either to institute, draw or carry on the lottery; and, therefore, they cannot delegate a power which they have not. They are trustees for the purpose of receiving and disbursing the net proceeds; and if the bond, as required by the 3rd section, is given, and taken by the person officially authorized, and in such sum and with such security as such Judge or Judges shall approve, and with condition as the act pre-

scribes therefor, upon a breach of such condition, in the non-payment over to the trustees of the net proceeds, they would, according to the 8th section, have a right to sue in the name of the State. For, the interest confided to the trustees is in the trust fund when received; and that is the only interest they have any concern with.

As I have already noticed, under and by the provisions of the act, the State stands in the relation of principal, expressly and directly delegating power and authority to the manager or managers, when elected and appointed in manner and form prescribed by the law; and, as a necessary consequence, they become the agents of the State in the exercise of the delegated power and authority, and the responsibilities and liabilities of principal and agent are the inevitable result. Thence arise interests altogether distinct and separate from the net proceeds, or that fund which the trustees may have a right to look after and take care of.

It may be very proper for the trustees to pursue their remedies and protect the trust fund; but if they should do so, or neglect to do so, it cannot be that because they can take care of the trust fund that, therefore, the State should abandon all control and have no right or remedy over its own agent. This would seem to be reversing the order of things, and placing the principal in the power of the agent holding and exercising an authority in violation of the trust and confidence reposed; and it cannot be sound doctrine, either here or elsewhere. It must be repudiated, as neither law nor in accordance with equity and good conscience. The trustees cannot revoke or annul a power they have not granted or delegated; nor have they any control over its exercise by the Act for the benefit of Sussex county. Yet, as the power and authority is granted, to be exercised by the agent until he raises a certain sum and defrays all expenses, costs and charges, the acceptance of such an

agency imposes the obligation to account; and, because such account may be required by the trustee of the trust fund, to ascertain the net proceeds, it would seem equally essential that the principal should have a right to demand it, to ascertain whether the power has been exhausted.

Further, by the terms of the grant the agent is required, before exercising the delegated authority, to give bond for the indemnity and security of his principal. If he fails to give such bond, in manner and form as specially required, it must be clear that for such omission none but the principal can apply the appropriate remedy, so as to restrain the irregular exercise of the delegated power. And this is to be done, certainly, not by treating his agent as a criminal, but by the appropriate remedy, well known and admirably adapted, not to punish but by its restraining influence to prevent injury and protect the right.

This liability of the State as principal for the acts of the manager or managers of this lottery appears to me to sanction the adoption by the State of such proceedings as any individual would be entitled to under similar circumstances.

It may be that the agent is proceeding without having given bond, as required : if so, the principal has his remedy by injunction. But such act of omission does not vacate the previous election and appointment: it only authorizes the suspension of the exercise of the delegated power by the legitimate remedy and by the authority of the proper tribunal. If the Act of Assembly had vacated the election and appointment of the manager or managers, on the omission or failure to give bond as required by the 3rd section, as has been done with respect to certain officers, then, as the delegated power and authority would have been revoked, there would be good ground for proceeding at common law, either by *quo warranto* or in a criminal court by indictment.

Opinion:—nature of suit—for breach of trust.

Having thus considered the Act of Assembly and its effect and operation, for the purpose of deciding the question of jurisdiction, it is only necessary to determine what is the object of the suit and the relief prayed. This can be ascertained from the bill, which, after setting forth the Act of Assembly, alleges, as against the trustees, a breach of their duty by exceeding their power in contracting with the manager or managers, after their election and appointment; and, contrary to the provisions of the act, taking bond to secure, not the net proceeds but an annual sum, as the consideration for the right to institute, carry on and draw the lottery; and, as against the managers, the object of the suit is to restrain the further exercise of their power or authority, because they have not given the bond in manner and form as prescribed by the 3d section of the act; and, additionally, on the ground that the power and authority has determined by the sum having been raised which the act authorized to be raised; and, with a view to ascertain whether the power has been exhausted, the bill prays a discovery of the schemes and classes drawn by the manager or managers, alleging that the continuance and further exercise of the authority by the manager or managers is contrary to the said Act of Assembly; all which, although it may be charged as contrary to the said act, and therefore unauthorized, is only equivalent to a charge of a breach of duty and of the trust and confidence reposed in the agent or manager. It is not necessary that I should here decide whether the defendants have fully answered or not, as I am only considering the question of jurisdiction. That matter will arise upon another part of the answer.

If, then, I have correctly apprehended the objectof this suit, the subject matter, as against the trustees, is a complaint for a breach of trust; and, as against the manager or managers, not only a breach of their duty in doing what is contrary to the trust and confidence reposed in

them as agents, but in omitting, as such agents, to execute the bond and give security for the indemnity of their principal, as by the Act of Assembly is required.

The answer of the trustees admits the material facts charged, as against them, viz: their appointment, the election of managers, the special contract between them, as trustees, and the managers, the bond taken to secure the annual payments, pursuant to the contract; and only states, what is no doubt true, that they are ignorant of the matters inquired about concerning the management of the lottery.

The answer of the defendant, Maury, the surviving manager, admits the material facts stated in the bill, viz, the passage of the Act of Assembly and the election and appointment of him by the trustees. It claims to derive his authority from the act and not from the trustees, admits the special contract and appends copies as well of his election and appointment as also of the special contract made by him and the deceased manager with the trustees for a sum annually payable by them to the trustees, as the consideration for the right to draw the lottery, for a certain number of years, &c. It also admits that the bond executed and given was such as the trustees directed and took to secure the payments according to the said contract; a copy of which bond is appended to the answer and sworn to as certified.

On adverting to the bond appended to the answer it appears to be a bond to secure the payments according to contract, &c., and does not contain any certificate of its being taken or approved by any Judge of the Superior Court of the State.

Hence, from the bill and answer, it appears that the object of the suit concerns a matter of trust, against trustees, and also of trust and confidence by a principal against his agent, as manager of a lottery, to be instituted,

carried on and drawn under his authority; and especially is the suit for the protection of the principal, by restraining the further exercise of the power or authority granted to the manager, because he has not executed the bond in manner and form as by law required; and, additionally, because he has exhausted his power, and has no authority to continue to exercise it; and to ascertain this fact the bill prays a discovery.

From this statement of the case, I entertain no doubt of the jurisdiction of this Court; and as the matters in the suit instituted relate to and concern transactions of trustees and the rights and liabilities of principal and agent in the exercise of fiduciary powers, requiring a discovery and an adjustment of the account of the agent as manager of a lottery; therefore, I have no difficulty in exercising the jurisdiction. I may add that the jurisdiction of this Court to restrain the unauthorized drawing of lotteries has been fully considered and sustained by the courts of Maryland. *Lucas et al. vs. The Lottery Commissioners*, 11 *Gill & Johns.* 490; *Lucas vs. McBlair et al.* 12 *Gill & Johns.* 1. In *Attorney General vs. Forbes*, 2 *Myl. & Cr.* 123, (14 *Eng. Ch. Rep.*) the general authority of the Court to restrain by injunction unauthorized acts of public functionaries, to the detriment of the public, is discussed and sustained.

With respect to the other ground of objection, that there is an adequate remedy at law,—if I am correct in the view taken of this case, I cannot discover how the principal, under the circumstances existing and admitted in this suit, could have relief at law. The special license having been granted, and the answer disclosing that it has been legitimately conferred, although its exercise may be irregular, it cannot be criminal, nor subject to be controverted by writ of *quo warranto*; therefore, I consider that sufficient relief can only be had in this Court.

The protest and refusal to answer as made by Maury,

Opinion:—rule as to exemption from discovery.

after having in his answer admitted his agency as manager, cannot entitle him to the privilege of withholding from his principal a full account of his transactions as manager, in instituting, carrying on and drawing the several classes of the lottery; for this obligation he voluntarily incurred by accepting the appointment and acting under it. The privilege can only be claimed when the object sought by the discovery is to make a criminal charge, and not when the party interrogated has, by his own act, contract or engagement, deprived himself of the right to claim the protection of this rule of equity. If a person will accept an appointment of trust and confidence, as manager of a lottery, he cannot, when called to account, either for irregular or for an unauthorized exercise of authority by virtue of the power delegated, withhold the discovery of his transactions on the ground that there may be a law making it criminal for a person, without special liberty, to set up and draw a lottery. In the present case the complainant makes no charge of any criminal offence, and all its charges are that the transactions, of and concerning which a discovery is sought, were contrary to and without the authority of the act which expressly grants to the defendant the special liberty to institute, carry on and draw a lottery. To suffer the defendant in this case to shield himself under the equitable rule which allows a defendant to refuse answering that which would subject him to penalty or criminal prosecution would enable the grantees of lottery rights and the managers thereof to abuse the special liberty conferred and to perpetrate the grossest fraud without discovery. For, in this case, I may with propriety remark, as was said by the Vice Chancellor in the case of *Green vs. Weaver*, 1 *Sim. Rep.* 404, (2 *Eng. Ch. Rep.*) that two propositions may be assumed, viz: (1) that the policy of the law requires that an agent should not only act with fidelity to his employer, but should be ready at all times to render a full and clear account of his

transactions; and (2) that, from the nature of this case, the defendant must possess, and perhaps exclusively possess, the means of stating that account which the policy of the law entitles the plaintiff to demand. I think these propositions are clear in their application to this case.

That I am right in considering that the general rule of equity is not applicable to the present case will more fully appear from the observations of the Vice Chancellor in the case above referred to, (*Green vs. Walker.*) in which the defendant refused to answer because the discovery of the facts called for by the bill would subject himself not only to the penalties, but also to give evidence against himself that he had been guilty of a breach of his oath; and, on these grounds, he claimed the benefit of the rule which protects a man from criminating or subjecting himself, by his own discovery, to penalties. After stating the ground upon which the defendant considered he was entitled to refuse the discovery, the Vice Chancellor, Sir J. Leach, makes some observations which I cannot do better than to quote in full. He proceeds to say: "Now, that the "rule of a court of equity is that a man shall not be com- "pelled to answer to any facts which may tend to crimi- "nate or subject him to penalties or forfeitures is undeni- "able; but the due application of this rule to the circum- "stances of individual cases has been at all times a matter "of much controversy; and so much so that I believe not "less than one hundred cases are to be found in the re- "ports, in which the question was whether the defendant "was or not bound to give the discovery sought for. The "due application of the rule to the present case is that "which I have labored to arrive at.

"If I decide that the defendants are bound to answer it "may be said that my decision is inconsistent with the "doctrine laid down by great Judges in former cases. If "I decide that the defendants are not bound to answer I

"may render those acts of Parliament, especially framed "for the purpose of protecting principals from the dis- "honesty of their agents, a cover to their agents in the "grossest and most scandalous frauds; for, stript of the "effect of the statutes as inflicting penalties, it would be "the common course of a court of equity to compel each "of these defendants to state on oath whether they were "employed as brokers and agents of the plaintiff; and "whether they acted in that capacity; and to set forth "every particular of each of the defendant's dealings, as "agent or broker of the plaintiff; and to produce every "entry in his book and every document relating to these "transactions.

"If a court of equity, in this case, should protect the "defendants from the discovery, the plaintiff's proceeding "at law must be quite nugatory; for the materials of evi- "dence must necessarily rest, almost exclusively, in their "possession. I hope this question may be decided without "my falling into the dilemma of impeaching any anterior "decision. I have looked through every case on this sub- "ject that was cited; and, most especially, I have applied "myself to those which were before Lord Eldon, which "have been much relied on. I have looked through a "great variety of those cases, and I believe I have consid- "ered every case that a diligent search in the books has "enabled me to find, that has any bearing on this question. "Upon those cases that I do not now rely on, it may be "sufficient to say, they established the general principle, "and must protect the defendant against the discovery. "But, from the current of authority, I think this result may "be derived, as established by a series of decisions, travel- "ing through a long series of years, namely, that a man by "the effect of his own acts, may exclude himself from the "benefit of that rule of a court of equity; or, to adopt the "expression of a very great Judge, he may contract him- "self out of the protection afforded by the principle of the

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" Court. The first case that I allude to as establishing that " proposition, that a man may so contract himself out of " the protection of the Court, is the case of the *African* " *Company vs. Parish*, 2 *Vern. R.* 244, decided in 1691. It " was a short case, as the majority of Vernon's cases are. " It is thus : ' The African Company hired the defendant's " ship to freight. The defendant, by charter-party, as is " usual in like cases, agreed that if the defendant traded in " goods the Company dealt in, he would pay such and such " particular sums to the Company in respect thereof; that " is, in the nature of a forfeiture or penalties, and would " deduct such sums out of the freight that should be coming " to him. The bill was filed by the Company to discover " whether the defendant had or had not traded in any such, " and what, goods: and the defendant pleaded the charter- " party (on which it appears the sums therein mentioned " were double the value of the goods themselves, and so " were in the nature of a penalty) and that he ought not " to be compelled to make a discovery by answer touching " the same, so as to subject himself to such penalties. The " short decision is; the defendant must be bound by his " own agreement: having agreed that it shall be deducted " out of the freight, he ought to discover; it having been " adjudged so several times in cases of the East India Com- " pany.' Now, the note refers to the East India Company's " cases, which I have not been able to find. This note, " short as it is, will appear a little elucidated by Mr. " Raithby's edition of that book; but it is inconsistent " with the principle held by other Judges. The next case " that I find is, the *East India Company vs. Atkins*, 1 *Strange* " *R.* 168. That case was decided about thirty years after- " wards, in the year 1720; and the language of that case, " in the judgment, is very important as to a subsequent " part of the present case. I shall not take up time in " going through deliberately all these cases, because the " cases being before counsel, it will be a waste of time.

Opinion :—rule as to exemption from discovery.

"The short note is this: 'that where a man submits to "be examined as to matters which are penal to him, equity "will not interpose.' The result however, is that in the "judgment in that case it will be found to rest on the rea- "soning that a man, having contracted to make the discov- "ery, is bound to do so. The next case that I consider of im- "portance is that of the *South Sea Company vs. Bumpstead.* "1 *Eq. Cas. Abr.* 77, and was decided eight years afterward, "in 1728. The agreement in that case was under a simi- "lar contract, by penalty, not to trade beyond a certain "extent, and the discovery sought was whether he had "violated that contract. The objection was that he would "subject himself to penalties. The Court thought that, "as he had covenanted not to plead or demur, he could "not then object to the illegality of that covenant, and "that he was bound to make the discovery; and in the "judgment there the Court recognizes the authority of the "*East India Company vs. Atkins.* The next case is *Wilson* "*vs. Prince*, 2 *Ves., Sr.*, 244, which appears to have been "decided in 1746, but is not reported. It was cited in "argument before Lord Hardwicke, and I give credit to "the case as cited before Lord Hardwicke.

"I think, from this series of decisions, there is sufficient "to authorize one to decide that a man may contract so "as to incur the obligation to make the discovery of all "the facts relative to that contract, although the effect of "that discovery may incidentally subject him to pecuniary "penalties. The reasoning of Lord Eldon, in the cases of "the *East India Company vs. Neave*, 5 *Ves. Jr.* 173, and *Pax-* "*ton vs. Douglas*, 16 *Ves. Jr.* 239; 19 *ib.* 225, imply that he "assents to the principle, that a man may by his conduct "incur an obligation to discover the facts, although that "discovery may incidentally subject him to pecuniary ob- "ligations. *Paxton vs. Douglass* has been a good deal "relied on by the other side; and I am free to confess that "that case did perplex me excessively by some of the dicta

"laid down by that great Judge. For, he went there to "the extent of stating not only that a man should not "make a discovery that would subject himself directly to "a penalty, or criminal prosecution, but that every ques- "tion leading incidentally to that conclusion would be "likewise equally objectionable. Now, when one comes "to look at that as a proposition unexplained, one cannot "help seeing that the true principle of a bill in equity is "that every statement of fact in every bill ought to be in- "cidentally leading to the same conclusion ultimately as "the prayer of the bill does lead to; for the fact is either "conducive to the general result, or it is unimportant and "irrelevant. But I take Lord Eldon to have meant (what, "perhaps, is not very fully explained in the report, and "what satisfied my mind a good deal) not that every fact "which may lead to the effect of subjecting a defendant to "a penalty, is objectionable; but where the sole gist and "object of the suit is to convict a man in a penalty— "where there would be no other purpose but to have re- "lief in a court of equity on the footing of penalty, that, "as a court of equity does not relieve on penalty, it will "not give any incidental discovery. That is the way I "reconcile and get rid of the dicta laid down in *Paxton* "*vs. Douglass.* But, however, when one looks at what Lord "Eldon did in point of declaration in the other cases, and "most especially in the case of *Ex parte Dyster*, 2 *Rose* 349; "1 *Meriv.* 155, one cannot help thinking that he could not "have intended to lay down the doctrine in a general, un- "restricted manner. The case came on upon a bankrupt "petition to prove a debt against a certain bankrupt's "estate. The objection, in answer to the petition, was that "as the petitioner traded as a principal at the same time "as he was acting as a broker, and participating in brok- "erage profits (which the law prohibited) therefore, the "law would not permit proof to be made of profit acquired "by such trading. Lord Eldon throws out a suggestion

" that he has nothing to do with the act, so far as it respects " transactions between the broker and the city of London ; " and he permitted the debt to be proved. Now, it cannot " be doubted that, if he admitted the debt to be proved in " that case, the discovery sought by the bill ought to be " made.

" Then, the next question is, inasmuch as the objection " to make the discovery arose, in the cases I have referred " to, from the stipulations of instruments under seal, can " the solemnity of the seal make the obligation to discover " more obligatory in a court of equity than the moral ob- " ligation resulting from the relation of principal and agent, " when one reposes and another accepts the confidence so " reposed ? The reasoning of the judgment in the case of " the *East India Company vs. Atkins*, I think, shows con- " clusively an opinion that such was the moral obligation " that, on that ground, the discovery ought to be made. " Although *Strange* is not a book we can place much con- " fidence in, yet in this particular instance it appears to be " a very able and sound judgment and well reported. I " should say that a court of equity knows no difference " between a mere moral obligation and one resulting from " stipulation by deed."

These principles, so fully and lucidly discussed by the Vice Chancellor, are clearly applicable to the case before me; and I consider the defendants as bound to make discovery of the matters necessary to enable this Court to determine whether the authority given by the act under consideration has been exhausted. It is, therefore, ordered that the exceptions to the answer of the defendant, Maury, be allowed; that a further answer on the points excepted to be made, and that meanwhile the injunction continue in force.

This case was never further proceeded in, the defendants submitting to the injunction.

Statement of the case.

ANTHONY G. HASTINGS, JOSHUA H. IRONS AND BENJAMIN D. BURTON,

vs.

JEHU CLENDANIEL AND SAMUEL NEALL, trading as CLENDANIEL & NEALL, AND RICHARD F. HASTINGS.

Sussex, March T. 1853

A bond executed in *blank* by H. and sureties, to enable him to raise $300 by loan from B. was filled up and delivered, without their knowledge, to C. & N. for $354 48, in payment of a debt *Held*, fraudulent and void as to the sureties.

A bond executed in *blank*, for a specific purpose, cannot be otherwise filled up, without authority of the obligors.

Such authority must be proved affirmatively, to sustain the bond.

BILL FOR RELIEF OF SURETIES IN A BOND, FOR FRAUD.—The bill alleged that Richard F. Hastings, being desirous to borrow from James Bishop $500, on five years' credit, applied to the complainants to become his sureties; that with a view to such loan, and to no other object, they signed and delivered to him a printed judgment bond in blank, confiding in him, that, upon obtaining the money, he would fill up correctly, according to their understanding, the blanks for the name of the obligee, the amount, date and time of payment. The bill alleged that he failed to get the money from Bishop, and then applied to the defendants, Clendaniel & Neall, who declined to advance any money on the bond, but proposed to accept it in payment of an antecedent debt due them from Hastings and a former partner, Dunning, of $354.48; that Hastings consented, and filling up the bond for $354.48, delivered it to Clendaniel

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& Neall—the whole transaction being without the knowledge of the complainants. Hastings has become insolvent and Clendaniel & Neall are proceeding, by judgment and execution, to collect the money from the complainants. The bill charged that Clendaniel & Neall had knowledge of the facts, and that the bond was fraudulently filled up and delivered. *Prayer* for an injunction.

The answer of R. F. Hastings admitted the facts, as alleged in the bill. Clendaniel & Neall, by their answer, denied all knowledge of the circumstances attending the signing of the bond, and alleged that Hastings brought it to them, signed in blank, representing that he was authorized to fill it up for any amount, not exceeding $800, payable to any person, in order to raise money to sustain his credit; that he could use it in payment of debts, but desired to raise some cash; and he proposed to these defendants to fill it up for $500, and give it to them in payment of a debt of $354.48, due from him on his own account and as one of the firm of Hastings & Dunning, if these defendants would advance him the difference, $145.52. They refused to advance any money on the bond, but agreed to take it for their debts on the faith of Hastings' representations. It was filled up and delivered accordingly.

Issues were joined and depositions taken. The material facts, in proof, are set forth in the opinion of the Chancellor.

The cause came before the Chancellor, at the March Term, 1853, for a hearing upon the bill, answer, exhibits and depositions.

Layton and *Saulsbury*, for the complainants.

E. D. Cullen, for the defendants.

JOHNS, JR., CHANCELLOR.—In this case the complainants

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signed and sealed, as sureties, a printed form of a single bill, with warrant of attorney to confess judgment, without filling up the blanks, either as to obligee, sum to be paid, time of payment or date, and delivered the same to Richard F. Hastings,to borrow a sum of money from James Bishop, of Sussex County. The application having been made by Richard F. Hastings to Bishop, and he not having any money to lend, the object contemplated by the verbal agreement of the parties failed, and the blanks were not filled up. Hastings retained the printed form, with the blanks not filled up, and in that condition took the paper to Philadelphia, and there offered it to Nathaniel Hickman, informing him of the purpose for which it had been given; and stated his authority to fill up the blanks, agreeing to fill them up in favor of Hickman, provided he would advance him a sum beyond the amount of his indebtedness. This Hickman declined, and stated that he could not take the security offered, inasmuch as the blanks had not been filled up at the time when it was signed and sealed by the parties. Richard F. Hastings, being also indebted, on his individual account and as a partner of Dunning, to Clendaniel & Neall, afterward made a similar offer to them, and they also refused to loan or advance any money on the security of the instrument; but they agreed to take the same in discharge of the amount due them from Hastings and the firm of Hastings & Dunning; and they admit they were informed that Hastings expected to have borrowed money from Bishop, but was disappointed, and that he had the same instrument in blank as to the date, obligee, sum and time of payment. Before the blanks were filled the defendant, Clendaniel, admits that he inquired particularly of Hastings as to his authority to fill the blanks, and was satisfied by his verbal assurance; and that, confiding in such verbal declaration that he was authorized, he thereupon, on the blanks being filled up by Hastings, accepted from him the instrument, and now holds the par-

ties signing it as sureties for such a purpose, responsible to the firm for debts antecedently created, and for which they never consented to become sureties, and for an amount larger than they had agreed to become liable. It is conceded that by the transaction the firm of Clendaniel & Neall obtained from the debtor, Richard F. Hastings, a higher security, legally binding him; and, therefore, they were not prejudiced. But the complainants, under the circumstances of the case, consider they are entitled to relief, as the blank instrument was in that condition which apprized the party accepting it of its invalidity against them as sureties. It is, therefore, only necessary that I should consider whether the complainants were liable as sureties. It is apparent no money was advanced or loan obtained on their credit, but, on the contrary, the defendant, Clendaniel, expressly declares in his answer that he refused to advance one cent. He knew that the paper had been signed in blank, to obtain a loan, while refusing to make such loan.

After full consideration of this case, I can discover no analogy to the decisions of cases referred to under the rule which protects purchasers without notice and for a valuable consideration; nor does it appear that the parties complainants, by signing the blank printed form, intended to commit a fraud. They admit the signatures were made by them, as sureties, to enable Hastings to obtain the loan of money from Bishop; and this they had a right to do; and from the nature of the blanks, and the signature being under seal, it was not incumbent on them to give notice in order to protect third persons from such a paper, since it was not negotiable. There was enough appearing on the face of it, independently of its want of negotiability, to guard against deception and induce any person, to whom application might be made, to inquire into and be satisfied as to the legality and authority of the party offering it as a security either to fill up the blanks

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or to render it valid as against the parties who had signed their names under seal, leaving the blanks as to sum, date and obligee. It is evident, from the deposition of Hickman, that he so regarded the paper, and declined to loan any money on it. And the same appears to have been the opinion of Clendaniel, since he refused to take it as a security for any advance or loan of money, as in his answer he admits. It is apparent that Clendaniel was fully aware the holder of the printed form in blank, notwithstanding its being signed and sealed, could not fill up the blanks nor render it available against the complainants, unless authorized so to do; he, therefore, questioned Hastings as to his authority. This clearly shows, from his own admission, that he was put on his guard; and, if he waived his right to the exhibition of the requisite and legal authority and chose to confide in the verbal assurances of Hastings, he, with his eyes open, assumed the risk, and should suffer the consequences of his own imprudence and of the fraudulent conduct of Hastings.

In the case of *Baring vs. Shippen*, 2 *Binn. Rep.*, 154, Tilghman, C. J., remarks: "who can say that the answer of Cutting is not material to prove fraud? It tends to prove that a bond which was given by Mrs. Shippen to Cutting, for the sole purpose of raising money for her use, was applied by him to the purpose, not of raising money at all but of paying a debt of his own. If Mr. Baring had applied to Mrs. Shippen before he took the assignment, (which in prudence he ought to have done) he would have found at once that Cutting was acting a fraudulent part, and the mischief would have been prevented: not having done so, he took the assignment at his peril, and has no right to complain of the defence set up against him."

In the same case Yates, J., says: "the general matter contained in the answer or depositions of John Brown Cutting, (the assignor) might well be given in evidence.

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They tend to avoid the bond by showing it was made use of for a very different purpose, from that for which the deed was executed by the defendant. It is clearly settled that an obligation, in the hands of an assignee, is subject to all the equity which could have prevailed against the original obligee." If then a bond executed by A. to B., for the purpose of raising money on it by B., as the agent of A., being assigned by B., in payment of the debt of B., cannot be enforced against A., by the assignee, because applied to a different purpose from what was intended by the obligor, it would appear conclusively to follow, that a printed form of a single bill, signed and sealed by persons as sureties, and left blank as to obligee, sum and date, for the purpose of enabling the principal to borrow money from a particular person, when applied in payment of a pre-existing debt due to a different person, cannot by such obligee be enforced against the sureties. It would be the duty of the person to whom such an imperfect instrument was offered to inform himself before accepting it. But when, by the answer of the obligee and the answer and deposition of the principal, it is conceded and proved that the obligee was aware of the purpose for which the blank instrument was originally signed and sealed in blank, and had refused to advance one cent on the credit thereof, the subsequent acceptance thereof for a different purpose, and the filling of the blanks for such purpose, and for larger amounts, cannot avail the party thus acting, as against the complainants. They had agreed to become sureties for a very different object and amount, and never contemplated becoming sureties for any of the existing debts of Hastings, nor for the amount or sum inserted. He, by executing and delivering the single bill to the firm of Clendaniel & Neall, bound himself and no one else. Hence, I consider, under the circumstances of this case, that the transaction as against the sureties was fraudulent, and that they are entitled to relief; and, therefore, I must decree that the

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defendants, Clendaniel & Neall, be perpetually enjoined from any further proceedings at law to collect this debt of Hastings from the complainants, or either of them, by virtue of the said single bill, or the judgments entered thereon against the said complainant, or the execution process issued upon said judgments; and that the defendants pay costs.

Decree accordingly.

Decree affirmed by the Court of Errors and Appeals, at the June Term, 1853. 5 *Harring. Rep.* 408.

OUTTEN D. JESTER,

vs.

ALEXANDER V. MURPHY,

New Castle, Sept. T. 1858.

A vendor of certain store goods agreed to take them back, if unsold within one year, or to make good the loss upon a re-sale. His bond for $700,00 given subject to a written defeazance declaring it to be for the "security and safety of a forfeiture to the same amount, which the vendor stood bound for in an agreement for the purchase.&c.,' *held* not to have been given for stipulated damages but as a security for loss actually sustained by vendor's refusal to take the goods back.

Under a decree for an account, after a loss of books and a lapse of twenty years from the date of the transactions, a general statement of account, made about the time of the transactions, admitted.

BILL IN EQUITY TO ENJOIN COLLECTION OF A JUDGMENT.

The bill made the following case:

The complainant, on the 26th of April, 1833, sold to the

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defendant a china store, in Westchester, Pennsylvania, for $1400.00, at the same time agreeing, either to take it back, if unsold within one year, or to make good the loss upon a re-sale. Afterward, in June, 1833, the better to secure the defendant against loss, the complainant gave him a judgment bond for $700.00, taking from the defendant a defeazance in writing, to the effect, that the bond was given for the "security and safety of a forfeiture, to the same amount, which Jester stood bound to me in an agreement for the purchase of a china store, &c."* Judgment was entered on the bond in Pennsylvania and execution issued, in June, 1833. In November, 1833, the complainant removed to Delaware, engaged in business and failed. The bill alleged that in September, 1850, he compromised with the defendant in writing for the release of the judgment on payment, within a year, of $157.00; that, within the year, the complainant called on the defendant, prepared to pay the sum agreed on, but that the defendant, in the interview, got possession of the agreement, and then demanded the whole debt; that afterward he brought an action in Delaware upon the judgment entered on the bond in Pennsylvania and recovered judgment. The bill further alleged that the defendant did not call on the complainant within the year to take back the store: that he

* The defeazance was as follows, viz:

"Be it known, that Outten D. Jester has this day given me his judgment bond, to the amount of $700.00, for security and safety of a forfeiture to the same amount, which he stands bound to me in an agreement of the purchase of a china store of him the 26th of April last. This is to show to my survivors that if the said O. D. Jester should take the store back, per agreement, or if I should not sustain loss to that amount in keeping or selling, I bind and obligate you as my representatives to refund to him, or his heirs, whatsoever balance of said bond I recover, after deducting all cost and trouble.

In witness whereof I subscribe my name the 12th day of June 1833.

(Signed) A. V. MURPHY.

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had sold it; that he had rendered no account of loss from 1833 to 1850; that in fact he had sustained no loss.

Prayer, for an injunction.

The answer admitted the giving of the bond, the entry of judgment on it in Pennsylvania, and that a suit upon the judgment had been brought in Delaware. It insisted that the bond was given to secure stipulated damages, in case the complainant should not take the store back, which he was repeatedly requested to do; that complainant had been duly notified of the loss sustained and refused to take the store back, but was at the time wholly satisfied and agreed to the entry of the judgment. The answer alleged that the agreement to release the judgment on payment of $157.00, was obtained by fraud; that by the death of his father Jester came into possession of considerable means, which he concealed from the defendant, and thereby obtained the agreement; that afterward, upon being charged with the fraud, he surrendered the agreement to the defendant; that he had never paid or offered to pay the $157.00.

The cause came before the Chancellor, at the Feb. T. 1857, for a hearing upon the bill, answer and exhibits; the main question, at this hearing, being as to the character and effect of the bond for $700.00, referred to in the bill and answer. The Chancellor considered that the bond was given, not as a stipulated forfeiture upon Jester's refusal to take back the store, but as a security for the loss caused by such refusal. He, therefore, made an interlocutory decree for an account of the goods purchased and sold.

Under this decree the defendant filed a statement that he had lost his books, and in lieu of an account from the books, submitted a general statement of account, made

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April 2nd, 1834, showing the amount of the purchase and of the sale, and shewing a loss on the goods of $399.11.

At the Sept. T., 1857, a motion to strike off this statement, as a non-compliance with the decree for an account, was refused; and an order was made that the statement be taken as filed and be open to proof on both sides; and that the cause be set down for a final hearing at the next term.

From the evidence it appeared that no inventory of the goods was made at the time of their purchase. They were proved to be worth at the time of sale about $1000, and the amount of sales was $684.10.

The cause came before the Chancellor for a final hearing, at the Sept. T., 1858.

G. B. Rodney, for the complainant.

Michener, (of Philadelphia) for defendant.

HARRINGTON, CHANCELLOR.—The interlocutory decree to account, in this case, settles the character of the bond for $700.00, upon which judgment was obtained in Pennsylvania, and afterward in an action of debt in this State. It was not an absolute bond, but was subject to a defeazance, being given on sale by Jester to Murphy of a china store, in April, 1833; and the $700.00 were to be forfeited if Jester should not take back the store in a year thereafter, or pay any loss that Murphy might sustain on a re-sale of the goods.

The interlocutory decree forbids me also to decide that this forfeiture of $700.00 became absolute on a re-sale of the goods and non-payment of the loss, even after Jester had submitted to and encouraged proceedings on the judg-

ment as an absolute judgment; but this decree assumes that the real loss, and not the agreed forfeiture, is the equitable compensation to which the defendant is entitled. And, for the purpose of ascertaining this loss, it required the defendant to file an account of the said goods, at their cost value; also an inventory thereof and the specific amount for which they were sold. The defendant filed a statement, in effect,that as no invoice had been made at the purchase and his books had been destroyed, he could not, after more than twenty years, state these particulars; but he set forth the fact that an inventory and appraisement, amounting to $1021.21, had been made at the time of the sale (which is exhibited) and also the amount of these sales, viz: $684.10, which is $337.11 less than the inventory, showing a loss to that amount, without adding costs. But, it is urged by the complainant that there is not sufficient proof of the value of these goods when bought; that there may have been intervening sales of a portion of them, and probably were, as the defendant occupied the store and was authorized to sell, and especially as the valuation, made at cost prices when they were finally sold at auction, was less than the sum at which they were originally valued by the parties themselves. I think this is reasonable, and that the difference between the purchase money and the amount of the public sale, viz.: $378.79, may fairly be taken to represent the value of the goods which had been sold at private sale, which being added to the amount produced at the public sale, $684.10, would make the total amount realized by the defendant to be $1062.89, from which deducting the cost of sale, $62, there remains $1000.89. This sum being deducted from the $1400.00 at which they were valued by the parties when Murphy purchased, will give $399.11 as the real loss sustained by him, and which the complainant agreed to compensate.

I do not take into consideration anything additional, for house rent, clerk hire &c., but only the cost of disposing

of the goods; since no such stipulation beyond this is made in the instrument of defeazance, which, according to the interlocutory decree, covers merely the loss sustained on a re-sale of the china store; but Murphy is entitled to interest on the $399.11 from the time of the sale, 19th April, 1834, say for twenty four years and six months to 11th October, 1858, which is $586.68, making in all $985.79 due on this day. For this sum let a decree be entered—the judgment to stand for that amount and costs, and also the costs of this suit.

Decree affirmed by the Court of Errors and Appeals, at the June Term 1859. Appeal not reported.

JOHN LOGAN,

vs.

JOHN MCALLISTER, JR., AND WILLIAM Y. MCALLISTER, TRUSTEES, ET AL.

New Castle, Sept. T. 1858.

An express acceptance of an act of incorporation is not essential to the corporate existence, unless required by the act. An acceptance is implied from an organization of the corporators and the exercise of corporate powers.

An act incorporating, without condition, persons already associated in business, having been granted on application, and ascertaining the corporators, vests the franchise immediately, subject only to such acceptance as is shewn by the exercise of the franchise.

An act was passed, upon the application of W. Y., incorporating "W. Y. and his associates," as the Rockland Manufacturing Company on the

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Brandywine; also, appointing directors and providing for their succession. The business had previously been carried on by the firm of W. Y., Son & Co. Soon after the passage of the act the partnership was dissolved, public notice given that the business would thereafter be carried on by the Rockland Manufacturing Company, new books were opened, a corporate seal procured, business conducted in the corporate name, the capital transferred on the books; and the real estate of W. Y., used in the business, was agreed to be taken at a valuation. After the death of W. Y., without having conveyed the real estate, the same was conveyed by trustees, under the direction of his will, to the Rockland Manufacturing Company as a corporation. *Held*, that the corporate existence was sufficiently established, and that title to the real estate vested in the Rockland Manufacturing Company as a corporation.

BILL IN EQUITY, filed under the circumstances following:

William Young and also William W. Young and Isaac Bannister, prior to the year 1825, were associated as partners, under the firm of William Young, Son & Co., in the business of manufacturing cotton and woolen goods, at Rockland, on the Brandywine Creek, New Castle County —the capital of the firm belonging to William Young. In February, 1825, upon the application of William Young, the Legislature of Delaware passed an act providing, in terms, "that William Young and such other persons as now are or hereafter may be associated with him, for the purpose of carrying on the manufacturing of cotton and woolen goods and machinery, at Rockland, on the Brandywine Creek, in New Castle County, shall be, and hereby are ordained and declared to be, a body politic and corporate, by the name of the Rockland Manufacturing Company on the Brandywine," &c.—the act proceeding to confer the usual corporate powers. The act provided for a capital stock not to exceed $300,000, in shares of $1,000 each, and for a board of five directors, to be chosen by the stockholders annually on the second Tuesday of January, with power to manage the business and concerns of the corporation; and it directed that until the first annual meeting the directors should be William

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Young, John McAllister, Senr., John McAllister, Jr., William Wallace Young and Isaac Bannister. There was no provision for an express acceptance of the charter.

It did not appear in the cause that William Young and those associated with him ever accepted in writing the act of incorporation; but that they did in fact, soon after the passage of the act, organize as a corporation, under the name of "the Rockland Manufacturing Company on the Brandywine;" that public notice was given of the dissolution of the firm of William Young, Son & Co., and that the business would be continued by the corporation; that directors were chosen, a common seal procured and adopted, meetings of the directors held, who exercised the powers conferred by the act, filling vacancies in the board from time to time, keeping minutes of its meetings; that books of account were kept and the business contemplated by the charter carried on in the corporate name from December in the year 1825, until the year 1841, when the company suspended business and sold and transferred its personal property to William W. Young and John E. Young, who leased the real estate and continued the business, on their own account, until July, 1846, when they became insolvent.

At the organization of the Rockland Manufacturing Company in 1825, the Company took and thenceforth held possession of the real and personal estate held by the firm of William Young, Son & Co., but which in fact had been the property of William Young. The entire property was taken by the corporation at a valuation of $137,208.03, at which sum the property had been charged to the corporation in the name of the old firm. The title to the real estate was held by William Young, by whom no conveyance was made to the Company during his life-time. He died in May, 1829, leaving a last will and testament, by which, among other things, he devised to William W. Young

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and John McAllister, Jr., their heirs and assigns, all his, the testator's estate, "on both sides of the Brandywine, in New Castle County, State of Delaware, tendered to the Rockland Manufacturing Company and agreed to be accepted by them," (being the same real estate held and used by the Company,) and also all the fixtures, machinery, utensils, stock and effects which had been charged against the corporation in the name of the firm of William Young, Son & Co., the said devise being made upon the trust following, viz: "in trust to convey the same, as soon as convenient after my decease, with all my right, title and estate therein, and all the water rights, privileges and appurtenances, unto the said Rockland Manufacturiug Company, at their cost, provided they pay therefor to the said William W. Young and John McAllister, Jr., or their lawful representatives as aforesaid, on account of my estate, the sum of $130,000, the excess of said valuation beyond that sum being hereby released to the said Company; but this arrangement is not to affect the accounts between me and said Company, since they went into operation, which are in no manner connected therewith; the said sum of $130,000 to be paid as aforesaid in certificates of shares in the capital stock of said Company, to be paid agreeably to the act of incorporation thereof."

Pursuant to the trusts of the will, William W. Young and John McAllister, Jr., the trustees, on the 29th of June, 1842, conveyed and transferred all the property, real and personal, in the before recited devise mentioned, unto the corporation, the Rockland Manufacturing Company, its successors and assigns, and accepted as the consideration therefor, certificates of stock of the said corporation to the amount of $130,000. The Rockland Manufacturing Company held the property and carried on the business until July, 1846, when it was succeeded in business by William W. Young and John E. Young, as before mentioned.

John Logan, the complainant, became and at the filing

of this bill continued to be the assignee in insolvency of both William W. Young and John E. Young. William W. Young, one of the trustees under William Young's will, had been discharged from the trusteeship by the Orphans Court of Philadelphia, and William Y. McAllister, one of the present defendants appointed a trustee to fill the vacancy. The bill alleged that "neither the said William Young and the persons whom he had in association with him, in the manufacture of cotton and woolen goods and machinery, at Rockland, on the Brandywine, nor the said William Young and the persons whom he thereafter took into association with him in the said business, ever did expressly accept the said act, or ever did, under the said act of incorporation, adopt, have or use, a common seal, or issue or have any certificates of stock, or elect any director or directors, or other officer, or hold any meeting for that purpose, or for the transaction of any other business, as a body corporate, or purchase, receive, hold, transfer, sell or convey, any property, real or personal, in the name of the Rockland Manufacturing Company on the Brandywine, or do any other act, matter or thing, from which their acceptance of the said act of incorporation can be legally and properly inferred; and that neither under the said act of incorporation, nor under any other act of the Legislature of the State of Delaware, did any body corporate or politic, using the name of the Rockland Manufacturing Company on the Brandywine, composed of any persons whatever, exist in the lifetime of the said William Young, or at his death."

The bill charged that, inasmuch as there had been no acceptance of the charter and no corporation known as the Rockland Manufacturing Company on the Brandywine, legally created, the trusts of the will of John Young, deceased, for the conveyance of the property therein described to such corporation had failed; and that the same was held by the trustees for the heirs at law of the testator, being

Statement of the case.

eight in number, of whom William W. Young and John E. Young were two, being each entitled to one equal eighth part of the property so devised in trust. The bill alleged that the fixtures, machinery, utensils, stock and effects, valued at $79,208.10, had been wholly worn out in use, consumed or destroyed. It prayed that the trustees might be decreed to convey to the complainant, as assignee of William W. Young and John E. Young, and for the benefit of his creditors, the one equal eighth part of the real estate, and to account with him for a like share of the rents, profits and issues thereof, which had accrued since the death of William Young; also, that they should pay to him the equal eighth part of what was the value of the fixtures, machinery, utensils, stock and effects at the death of William Young, with interest thereon.

The answers of the defendants insisted that an express acceptance in writing of the charter, not being required by its terms, was not requisite for vesting the corporate franchise in William Young and his associates, but that they were by the charter itself invested with corporate capacity and powers *in præsenti* and unconditionally; that they did in fact organize under the charter; and the answers set forth in detail the organization and corporate acts and transactions of the corporation, as they are above recited; and the answers, therefore, insisted that the conveyance of the real estate in controversy, and the assignment of the fixtures, machinery, utensils, stock and effects by the trustees, under the will of William Young, deceased, to the Rockland Manufacturing Company, as a corporation, were valid and effectual, and that no title to said estate passed to the heirs at law of the said William Young, deceased, and to the said William W. Young and John E. Young, as two of such heirs at law, according to the case made by the bill.

The answers further set forth several other equitable de-

fences against the prayer of the bill; but these, although much relied on by the defendants, and fully argued on both sides, did not enter into the consideration of the Chancellor and need not be here stated.

A large body of evidence was taken on both sides, which so far as it is material, is sufficiently set forth in the opinion of the Chancellor.

The cause came before the Chancellor at the September Term, 1858, for a hearing upon the bill, answers, exhibits and depositions. The argument embraced many questions arising out of the case as made by the bill and answers; but it is deemed necessary to report only so much of it as relates to the question on which the case finally turned, viz: —whether the Rockland Manufacturing Company on the Brandywine ever had a corporate existence.

G. B. Rodney and *W. H. Rogers*, for the complainant.

The main question is, whether the charter of the Rockland Manufacturing Company was ever so accepted as to make it a corporation previous to William Young's death in 1829. We do not insist that a formal acceptance in writing is necessary. The acceptance may be by *acts*, but it must be by corporate acts—by acts of the body incorporated. *Ang. & Ames on Corp.* 78; *sec.* 83. And these acts must be direct and unequivocal, consistent with no other hypothesis but that of corporate existence. The acts relied on in this case are not of that character. The fact that the charter was one applied for is of no effect: for the application was made by William Young alone, not by those who were to become corporators. It was for them, and not for him alone, to accept. Other acts following the grant of the charter, such as the procuring of a seal, &c., were also by William Young alone, and were acts preparatory or tending to perfect the incorporation, but were not alone

effectual. There is no evidence of the use of the seal until 1842. The procuring of it is evidence only of an *intention* to organize. There is no sufficient proof of an organization by stockholders, of the election and meetings of directors, of the creation of a capital stock, of the adoption of by-laws, &c. It is proved that the old firm gave notice of its dissolution, and assumed the name of the Rockland Manufacturing Company; that in this name it kept its accounts, gave orders and transacted its business; but all this shews only a change of partnership name and not an incorporation. Except in name, the business, during William Young's lifetime, was conducted precisely as before the charter was granted. After Young's death no organization could be effected. The grant was *to him and his associates.* By his death an integral part of the contemplated corporation was lost. *Rex vs. Passmore*, 3 *T. R.* 97. Aside from this incapacity to organize, resulting from the death of William Young, the non-user of the corporate powers for so many years prior to the execution of the deed from the trustees, under his will, was evidence of a surrender, and incapacitated the Company from taking under the deed as a corporation. 19 *Johns R.* 456. The result of the case is, that at the date of the deed from the trustees under William Young's will there was no corporation capable of taking under it, and that the trustees still hold the property in controversy for his heirs at law, among whom were William W. Young and John E. Young, to whose shares the complainant is entitled, as their assignee under the insolvent law.

J. A. Bayard and *D. M. Bates*, for the defendants.

The allegation of the bill that at the date of the conveyance of the property in controversy to the Rockland Manufacturing Company, no such corporation existed, is vital to the complainant's claim. What then is essential to a

corporate existence? Two things only, viz: corporators and a franchise vested. Under the grant of a charter the franchise is vested when the corporators are ascertained. Usually, certain acts are to be done by the corporators, in order to ascertain in whom the franchise is to vest, and the company does not exist until those acts are performed; but where the charter itself ascertains in whom the franchise is to vest, the Company exists as a corporation from the date of the charter. In such case no acceptance is necessary, other than what is inferred from the application made for the charter, from its beneficial character and from the use of it.

In this case, the charter ascertained the corporators, describing them as "William Young and his associates," the associates being William W. Young and Isaac Bannister. It not only ascertained the corporators, but supplied an immediate organization, by naming directors and providing for their succession. Nothing then was wanting but for the corporators to exercise the franchise vested in them, which they proceeded to do; and this, especially connected with the prior application for it and its beneficial character, was an acceptance. 10 *Wend. R.* 266; *Angell & Ames on Corp.* 69; 12 *Wheat. R.* 71; 11 *Maine R.* 227; 16 *Ib.* 224.

With respect to the acts of William Young and his associates, relied on by us as shewing an acceptance, they are of great number, being such as would not have been lawful but for the charter, and therefore are conclusive of the intent to act under it. The old Company was dissolved, public notice given that thereafter the business would be conducted by the Rockland Manufacturing Company, *as a corporation*, officers were elected, a seal procured, new books opened, the capital of William Young transferred on the books and an equitable title to the real estate made by contract, to be executed by deed, after survey. Certificates of

stock were not issued; but these are only evidence of title to stock and are not essential to the corporate existence. Meetings of directors and stockholders were seldom held, because of the limited number of corporators, requiring less formality of action. But through William Young's lifetime, and long after, the business was extensively and wholly conducted in the corporate name. It is proved also that the complainant for a number of years dealt with the corporation, was employed by it, was a witness in suits against it, and himself sued the Company as a corporation.

Further, a supplement to the charter, passed in 1847, affords a clear legislative recognition of the prior existence of this corporation; and this is conclusive, because the question of corporate existence is one between the corporators and the State. 1 *Humph. Tenn. Rep.* 339.

The corporate existence,once established, must be taken to have continued until terminated either by limitation, by repeal, by forfeiture judicially determined, by surrender or by loss of the power of succession, none of which modes of dissolution is alleged or proved. A mere temporary non-user of corporate powers is no evidence of a surrender of the franchise. *See Ang. & Ames on Corp.* 740, where the case cited from 19 *Johns R.* 456, is explained.

HARRINGTON, CHANCELLOR.—On the principal question raised in the case, I am of opinion that the Rockland Manufacturing Company, on the Brandywine River, had a legal existence, under the charter of February 8, 1825, and the supplement of January 5, 1847, by legislative grant, acceptance and action, so far as action under the grant was necessary and proper for the objects of the incorporation, and under the circumstances surrounding the parties in interest. This acceptance of the charter, and action under it, were of such public notoriety as to sustain the legal

character of this Company as a corporation and give it force, not only amongst the corporators and those interested in the Company, but with the public. The act was applied for, as it appears from the exhibits and from the public journals of the legislature, by William Young, then the proprietor of a large manufacturing establishment on the Brandywine. It incorporates the said William Young, and such others as were or might be associated with him for the purpose of carrying on the business of manufacturing woolen and cotton goods, and machinery, at Rockland on the Brandywine; and it appoints, as directors of the Company then incorporated, until the first annual meeting, and until others should be appointed and should act, William Young, William Wallace Young, John McAllister, Sr., John McAllister, Jr., and Isaac Bannister.

What remained to make this an existing corporation? The assent of the person or persons incorporated, their acceptance and concurrence must doubtless exist. The Legislature cannot confer a corporate existence on a heretofore dead body, which will not receive such vitality; but the fact of seeking such corporate existence, as well as the subsequent exercise of corporate powers, is evidence of an acceptance of the legislative grant. Proof of both of these exist in this case, satisfactory in itself, though not very full; as the circumstances surrounding this corporation did not often require a very formal exercise of powers in the usual manner of corporate action. Being the change of a partnership into a company, acting in a new capacity but much through the same agents, the proof of this character would not be so easy and obvious, as in the establishment of a new business, whether as a partnership or a corporation. The grant of corporate powers was applied for by William Young: it was made, and it was competent to the legislature to make it, to William Young, with or without associates. Persons were named in it to represent and carry on the corporation until others should be

chosen; and the corporate franchise was thus vested, inasmuch as the persons in whom it should vest were thus lawfully ascertained. These preliminaries, sufficient in themselves to establish a corporate existence, were followed by public notice, organization, the election of a president and other officers, a formal transfer of the capital of William Young to the Company, and an agreement to convey the real estate which was to form a part of the corporate property. This conveyance was directed by the will of William Young to be made, according to the intent and to carry out the objects of the incorporation; and it was made, accordingly, by the executors and trustees on the 29th of June, 1842.

The case made by the bill and answer, as agreed in the arguments, presents this as a preliminary question of vital importance to the cause, and the decision of which, on the opinion which has been already expressed as to proof of the legal existence of the Rockland Manufacturing Company, covers the whole case. It is not important, therefore, nor proper, that I should express any opinion as to the several other points raised by the defendants in this cause, considering as I do that the securities and deeds under which the defendants hold the property through that Company are valid, and that the claim of the complainant, as the assignee of William W. Young and John Evans Young, is invalid. The bill is, therefore, dismissed with costs.

Statement of the case.

SUSSEX DELAWARE DAVIS, ET AL.

vs.

PETER A. BROWNE.

New Castle, Feb. T. 1859.

Upon a bill filed against a trustee, charging mal-administration of the trust and threats of acts which, if committed, would cause irremediable injury, a receiver was appointed and an injunction ordered, on motion, without previous notice to the trustee.

BILL FOR REMOVAL OF A TRUSTEE.—The defendant was executor and trustee under the will of Samuel B. Davis, deceased; and held, subject to various trusts for the benefit of the testator's children, a considerable real and personal estate. The bill alleged sundry acts of mal-administration on the part of the trustee; chiefly, that he had sold a specific legacy of stock bequeathed to New Castle Delaware Davis, one of the sons; that he had neglected to pay interest on a lien upon a part of the real estate, in consequence whereof it had been sold for the debt; that he had needlessly sold the family plate at a sacrifice; that he was speculating in securities of the estate; and that he had threatened to sell a considerable body of unimproved land, which was likely to appreciate in value, if held for the children. The bill prayed for the removal of the trustee and that he be enjoined from further interfering with the estate, and particularly from selling the trust property; also, that a receiver be appointed, and that the trustee be decreed to account.

On filing the bill (which was sworn to) at the February Term, 1859, *Mr. Hood*, of Philadelphia, as solicitor for the

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complainants, moved for an injunction, as prayed for by the bill, and for an order appointing a receiver.

D. M. Bates, on behalf of the defendant, opposed the motion.

This application is a surprise. Not an intimation has been given of the intention to file this bill or to take any proceeding against the trustee. An application, based upon such charges and of so serious consequence to the trustee, ought not to be entertained without notice and an opportunity to be heard. The charges of the bill are, in part, grossly false, and as to the rest susceptible of full and satisfactory explanation. They would be wholly disposed of by the answer of the trustee, which, if opportunity were given, could be filed without delay; and thus the case would be disposed of on its merits and without injury to any one.

But, waiving the objection of want of notice—the case presented by the bill is that of mal-administration only, which is not of itself a ground for the summary interposition of the Court. To warrant this there must be danger of loss or destruction to the trust fund—such danger as arises from the insolvency of a trustee who has not given security. This trustee is not alleged to be insolvent, and is well-known to be wealthy; and, besides, he has given security, on his appointment, to the amount of $50,000.

With respect to the motion for an order to restrain the trustee from selling certain real estate, there is a question involved as to the power of the trustee under the will to sell this real estate. It is enough to say that if the will confers such power the Court cannot restrain it; while if no such power exists, the order moved for is unnecessary.

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Mr. Hood replied.

Notice of these applications is not required where the effect might be, by putting the trustee on his guard, to cause the very evil apprehended. 3 *Dan. Ch. Pr.* 1886; 2 *Eden on Inj.* (*Waterman's ed'n*) 339, 342, *note* 2, 352, 354, *note* 1, 355; *Middletown vs. Dodswell*, 13 *Ves., Jr.*, 226; *Willard's Eq. Juris.* (*N. Y.*) 342, 344, 367, 369. The abuses complained of are irremediable in their nature; and besides, they show, if true, such gross unfitness of the defendant for the trust, as to call for the immediate interference of the Court.

HARRINGTON, CHANCELLOR.—The ultimate object of this bill is to bring the executor and trustee of Samuel B. Davis, deceased, to an account of his trusteeship, and to prevent his so administering the trust as to defeat the will of the testator and injure the devisees and legatees.

The object of the present motion is for immediate action, before answer, by injunction and temporary removal of the trustee. I think the case made by the bill sufficient to ground the application. It charges not merely such mal-administration of the trust that it would be sufficient to rest upon the responsibility of the trustee and his sureties; but it is alleged that acts are threatened which might be irremediable.

I observe that the bill is defective in charging the defendant only as executor, in which character he is responsible to another tribunal. He should be charged as trustee.

Mr. Hood, upon leave granted, amended the bill, according to the Chancellor's suggestion; and the orders moved for were then granted.*

* The reporter, who was the defendant's counsel in this case, deems it just to his memory to state that the charges in the bill were fully met by his answer soon afterward filed, in which he alleged that the sale of the

Statement of the case.

HENRY K. HAYES, administrator c. t. a., of JOHN HAYES, deceased,

vs.

JOHN HAYES.

New Castle, Feb. T. 1859.

A legacy, presently payable, cannot be set off in equity against a debt of the legatee to the estate, not yet due.

Equity will not interfere to restrain the recovery at law of a legacy, on the ground that the legatee is indebted in a bond to the testator payable at a future day.

Equity will not interfere to restrain the legatee from an action at law for the legacy, on the ground that he is in contempt for not performing a decree made in another suit for the execution of a new bond, in lieu of the original one given to the testator and since lost.

A decree against the legatee for costs in the suit to enforce the execution of a new bond, is no ground for an injunction to restrain an action at law for the legacy, since such costs could be set off in the action at law.

BILL IN EQUITY, filed under the circumstances following:—

The defendant, John Hayes, was indebted to his father,

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specific legacy by him as executor, was required for the payment of the testator's debts; that he had paid the debts to the extent of the assets; that the sale of the family plate was with the approval of the widow; that he had not speculated in any securities of the estate but had faithfully applied all the assets realized; that he had not threatened the sale of the unimproved land referred to in the bill further than to express the opinion, which he still held, that its sale and the investment of the proceeds would be for the benefit of the *cestuis que trust*; that, considering the trust as attended with a power of sale under the will, he had entertained the question of its expediency; and the answer insisted that the trustee had in all things acted in good faith. The trustee dying after the answer was filed, the proceeding dropped.

Statement of the case.

John Hayes, now deceased, in his lifetime, in a judgment bond for the real debt of $1500.00, dated April 24th, 1854, payable at the expiration of ten years; the bond being executed as the consideration for certain real estate conveyed by John Hayes, the father, to the defendant. John Hayes, the father, by his last will, after making provision for his widow, devised all the residue of his estate, real and personal, to be equally divided between his ten children, including the defendant. The complainant, as administrator c. t. a., of the testator, passed, on the 19th of January, 1856, an administration account, showing a balance in his hands of $5700.43, distributable under the residuary clause of the will. The administrator refusing to pay the defendant his share of the residuary fund, the latter brought an action at law for such share on the administrator's official bond. This bill was filed for an injunction to restrain the action at law.

The bill claimed for the administrator the right by way of equitable set off, to retain the defendant's legacy, and to apply the same as a credit upon the debt due from the defendant to the testator's estate.

The bill further alleged as an equitable defence against the action at law that the bond given by the defendant to the testator could not be found by the administrator after the testator's death, the same having been mislaid, lost or destroyed; that the administrator had, thereupon, filed a bill in equity against the defendant for a decree to compel him to execute a new bond in lieu of the original one so mislaid, lost or destroyed; and that a decree to that effect had been made by the Chancellor, on the 17th of February, 1857—also that the defendant should pay the costs in the suit in equity; that the defendant had never executed a new bond, pursuant to the decree of the Chancellor, although requested so to do; that an attachment for the non-performance of said decree had been issued

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and returned *non est;* that the defendant then was, and still is, a non-resident of this State, and cannot be reached by the process of its courts. The bill further alleged that the defendant had sold and conveyed away the real estate for the purchase of which the bond in question was given.

The complainant insisted that the debt secured by the lost bond being part of the testator's assets, the defendant was in equity bound to make the estate secure by executing a new bond, in performance of the decree of the Chancellor, before being permitted to recover his share of the estate, that being not a debt of the estate but a gift from the testator. *Prayer*, for an injunction, and that the defendant be compelled to come to a settlement with the complainant, as administrator, and release or assign to him the defendant's share of the residuary estate of the testator; that so much of it as might be necessary be allowed to the complainant for his costs in the suit in equity, and that the residue be applied as a credit against the debt due from the defendant to the testator's estate.

To this bill the defendant demurred; and the cause came before the Chancellor, at the Feb. T. 1859, for a hearing upon the demurrer.

G. B. Rodney, for the complainant.

The demurrer is an admission of all matters well pleaded in the bill; and if any part the bill shows an equity the demurrer fails. Now, the bill charges that by the Chancellor's decree for the execution of a new bond by the defendant he was bound for costs. These become a debt presently due, and yet it was not a defence at law against the suit for the legacy. This, at least, is a ground for equitable relief. But, upon the main question, the equity of the complainant is clear. The legacy was a *gift* from the testator, and must be taken to have been made on this equitable condition, that the bond should be paid out of

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it. It is not like the case of a distributive share of an intestate estate, to which there is a legal right under the Statute of Distributions. It is true, that the bond is not yet due; but it is none the less a debt, only that it cannot be recovered at law. In *Jeffs. vs. Wood*, 2 *P. Wm's.* 128, in a case where a legacy had been given to the testator's debtor, the Court held it to be "very just and equitable for the executor to say that the legatee has so much of the assets already in his hands, and consequently is satisfied *pro tanto.*" That was a case arising under the bankrupt laws, under which mutual credits are set off. Though our Statute of set off refers only to debts, equity adopts the principles of the statutes of bankruptcy in setting off credits. 2 *Kent Com.* 473, (*n*); *Pothier on Oblig.*, 117, 118. The complainant's equity is strengthened by the consideration that the defendant is a non-resident of this State and is insolvent, and that there is likely to be no remedy for the recovery of the debt when it becomes due.

A further ground of equity, disclosed by the bill, is that the defendant is in contempt of this Court in not performing the decree for the execution of a new bond; and while in such contempt he should not be allowed the process of our courts for the recovery of this legacy.

D. M. Bates, for the defendant.

The bill, in seeking equitably to set off the legacy, now payable, against a debt to the estate not yet due, attempts to vary the contract of the parties as to the time for payment of the bond. Its effect is also to delay the payment of a legacy now payable by law. The question is, not whether a debt not yet due is *a debt;* but whether such a debt can be set off. A debt not due would receive its distributive share in bankruptcy; but it does not follow that a creditor may *sue* before the debt is due, or, what is of the same effect, that he may enforce its payment by way

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of set off before it is due. The question of set off is settled by our Statute which gives the right to set off only mutual debts, "due at the time of action brought," &c. *Rev. Code*, 380. Both demands are *legal* rights—the legacy and the bond; and are governed by the Statute. It is not a case of *equitable* set off, existing only in a court of equity, and with which that Court may deal, irrespective of the Statute. The defence would be a defence at law, if due; and is a defence nowhere until due.

The other ground of equity seeks, by injunction in this suit, to restrain the recovery of the legacy until the defendant performs a decree in another suit. This is a new and an indirect mode of enforcing decrees. This Court can employ no means of enforcing its decrees other than those provided by law. The bond and the legacy are totally distinct subjects; and the Chancellor could, with the same power here invoked, restrain a defendant, who is in contempt in a cause before him, from suing at all in a court of law, and so indirectly outlaw him. Our laws and practice know no such power.

As to the costs in the former suit, the administrator could have set them off in the suit at law for the legacy; for they were a debt due to the estate.

HARRINGTON, CHANCELLOR.—The question presented is, whether there is any equitable power to prevent a party from collecting, at law, a debt due him because he owes to the defendant a debt not due, and which the defendant may not be able to collect when it is due, if this fund is not stayed in his hands.

There is another question, growing out of the loss of the evidence of the debt, and proceedings in this Court to supply that evidence; the defendant being in contempt for not re-executing a bond, according to the decree of this Court, and also for non-payment of costs incurred in that

proceeding. It was also argued that the costs are a debt now due to the complainant, which *pro tanto* should prevent or stay proceedings at law against him for the legacy.

Both points involve the question of set off; the former of a debt not due, the latter of a debt due, if the costs have been paid by complainant; but which, in that case, the defendant contends would be a set off at law; and that, therefore, it is no ground of injunction here.

In *Jeffs. vs. Wood, et al*, the Master of the Rolls, while owning that it was against conscience that A. should be demanding a debt against B. to whom he is indebted in a larger sum and would avoid paying it, expresses merely a doubt whether an insolvent person may, in equity, recover against his debtor, to whom he, at the same time, owes a greater sum; but there is no necessity to go the length of establishing, as a principle of equity, that chancery will arrest proceedings at law for the recovery of a debt due and recoverable there on the ground that the plaintiff owes the defendant a sum not yet due, the payment of which he may evade, if permitted to recover in his suit at law. The law of set off as applicable to such demands is in this respect the same in both courts. Applied to such a case, it would be to anticipate the payment of a debt not due and to prevent the collection of a debt which by the contract of the parties is due and collectible. If there could be any question of this equity, where the aid of a court of equity is asked to enforce the demand, I think there is none to justify one in enjoining proceedings at law, either on the ground of equitable set off or as a means of enforcing obedience to a former decree of the Court in reference to costs. I do not doubt that these costs, if paid by this complainant, would be a set off at law to an action for the distributive share of the defendant, who by the Chancellor's decree is made responsible for them.

Statement of the case.

Demurrer allowed, injunction dissolved and bill dismissed with costs.

Decree affirmed by the Court of Errors and Appeals at the June T. 1859. The case on appeal is not reported.

In re, Estate of DR. GEORGE STEVENSON, deceased.

New Castle, Feb. T. 1859.

Equitable conversion of real estate by testamentary direction for sale—how far direction must be unqualified.

The testator, after devising his mansion house to his widow for life, provided thus:—"It is my desire that after the decease of my wife (or sooner if she should desire it) my dwelling house, &c., should be sold by my executors, hereinafter named, with the approbation of the Chancellor or an Orphans Court, and the proceeds equally divided among all my children now living, or their legal representatives." *Held*, that the real estate was equitably converted from the death of the testator.

PETITION BY TRUSTEE FOR INSTRUCTIONS.—Dr. George Stevenson, by his last will and testament, made in the year 1828, after devising his mansion-house and grounds to his wife, for her natural life, further provided as follows, viz: "It is my desire that after the decease of my wife (or sooner if she should desire it) my dwelling house and ground adjacent to it, in Wilmington, should be sold by my executors hereinafter named, with the approbation of the Chancellor or an Orphans Court, and the proceeds equally divided among all my children now living, or their legal representatives."

Statement of the case.

The testator, at his decease, left to survive him eight children and two grandchildren, the children of a deceased daughter. After his death, and during the life-time of the widow, Maria Stevenson, two of the testator's children died intestate,unmarried and without issue; that is,Francis Stevenson, one of said children, died October 9th, 1832, and Joseph B. Stevenson, another of said children, died December 13th, 1853. The widow of the testator died July 19th, 1857.

After the death of the widow, the executor, James Rogers, Esq., with the approbation of the Chancellor, signified by an order for sale granted at the Sept. T. 1857, proceeded to sell the mansion house and premises of the testator, in execution of the direction of his will, and at the Feb. T. 1858, made return of the sale, which was approved, and the proceeds ($22,020.26) after deducting expenses, were ordered to remain in the hands of the executor, for distribution under the will.

At the Feb. T. 1859, the executor by his petition, representing the facts, prayed the instruction of the Chancellor touching the distribution of those shares of the fund which would have been taken by Francis Stevenson and Joseph B. Stevenson, had they been living at the period of distribution. Of the children of the testator the eldest son, Dr. Henry Stevenson, was the child of a former wife; all the rest being children of the testator's widow. It was claimed by the heirs of Dr. Henry Stevenson (also now deceased) that the shares of the two children of the testator, who had died intestate, and without issue in the widow's life-time, and before the period fixed for the sale of the mansion house, had descended from them, as real estate, to all their surviving brothers and sisters, including the eldest brother of the half blood, he being of the blood of the common ancestor, from whom the estate was derived. On the other hand, it was claimed that the direction for sale

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worked an equitable conversion of the premises in the life-time of the widow, so that the shares of the deceased children passed, as personal estate, to their executors or administrators.

Accompanying the petition of the executor for instructions, there were filed concurrent petitions of all the parties interested, submitting to the decree of Chancellor their rights in the premises.

W. H. Rogers, for the representatives of Henry Stevenson.

To effect an equitable conversion, the will must direct a sale absolutely, without any qualification, irrespective of all contingencies and not subject to any discretion. *Leigh & Dalzell on Conv.* 15; *Newl. on Cont.* 54; 2 *Kent Com.* 230 (*n*); 2 *Sto. Eq. Jur.* 1214; *Wheldale vs. Partridge*, 5 *Ves. Jr.* 388, 8 *Ves. Jr.* 227; *Wright vs. Trustees of M. E. Church*, 1 *Hoff. N. Y. Rep.* 203; *Clay vs. Hart*, 7 *Dana's Rep.* 11; *Henry vs. McCloskey*, 9 *Watts Rep.* 145; *Negley's appeal*, 1 *Harris' Rep.* 260; *Blight vs. Bank*, 10 *Barr's Rep.* 131. A mere *power* to sell or purchase does not change the nature of property or the course of its descent. 1 *Jarm. on Wills*, 529.

The present case, even giving to the testator's expressed desire the force of a direction, is at most but a power, and its exercise subject to contingencies. During the life-time of the widow the sale was contingent upon her desire; and after her death it depended upon the discretion of the Chancellor. Until this discretion was exercised there could be no conversion. Meanwhile, by the death of the two children their shares descended as real estate. 9 *Watts. R.* 145.

D. M. Bates, for the other parties interested.

It is settled that a testator's expressed desire is a direc-

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tion. It was, evidently, not the testator's intention to make the fact of sale, whether or not it should be made at all, contingent upon the Chancellor's approval, but only to require his supervision and judgment with respect to the time and terms, as a security against a sale being made at an improper time or for an inadequate price. The purpose of the testator to sell was positive, and the direction in that respect unqualified. This brings the case within the established doctrine of equitable conversion. *Williams on Ex'rs.* 551. The rule is fully discussed in *Fletcher vs. Ashburner*, 1 *Bro. Ch. Rep.* 497.

THE CHANCELLOR, after holding the case under consideration, expressed the opinion that the direction for sale was sufficiently unqualified to work an equitable conversion of the fund from the death of the testator; and its distribution was decreed accordingly.

THOMAS TITUS, Executor of REV. HENRY WHITE, deceased,

vs.

JOHN HENRY MCLANAHAN, YELVERTON MCLANAHAN, SARAH ANNE MCLANAHAN, JAMES REED and SALLY E., his wife, JOHN D. WHITE, EDWARD WHITE and KING V. D. WHITE.

New Castle, Feb. T. 1859.

Bequest of a part of the sum due upon an obligation to the testator, *held* to be a specific legacy; and that, upon the insolvency of the debtor, the legatees are not entitled, in equity, to have the legacy paid out of the general assets.

BILL OF INTERPLEADER.—This bill was filed by the ex-

ecutor of the last will and testament of Rev. Henry White, deceased, for instructions touching the construction of a bequest to three of his grandchildren, viz: John Henry McLanahan, Yelverton McLanahan and Sarah Anne McLanahan. The bequest was as follows:—

"*Item 3d.* Whereas my son John F. J. White is indebted to me on two several obligations in my favor, both dated September 21st, 1847, one being for the real debt of three thousand seven hundred and ninety-two dollars and ninety cents, and the other for two thousand two hundred and forty-one dollars, with interest from those dates, it is my will,and I hereby forever release and discharge my said son John F. J. White, his executors and administrators, of and from the payment of the first named obligation for three thousand seven hundred and ninety-two dollars and ninety cents, with all the interest accrued thereon at my death; and I also release and discharge my said son, his executors or administrators, of and from the payment of one equal fourth part of the principal and interest which shall be due and unpaid upon the second named obligation for two thousand two hundred and forty-one dollars,at my decease; he remaining, however, liable to pay the other three-fourth parts of the principal and interest of the last named obligation, as hereinafter directed. And with respect to the said three-fourth parts of the principal and interest which shall be unpaid upon the said last named obligation, at my decease, I give and bequeath the same to my three grandchildren, the children of my deceased daughter, Elizabeth R. McLanahan, viz: John Henry, Yelverton and Sarah Anne, equally to be divided among them; *provided*, that if any one or more of my said grandchildren shall die under the age of twenty-one years, without leaving lawful issue,then the share which would have been taken by any such deceased grandchild shall vest in the survivors, equally to be divided between them. I direct that payment of the said three-fourth parts of the last named obli-

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gation by my son John F. J. White shall not be enforced otherwise than in three equal annual installments,the first to be payable at the expiration of one year after my death. If, at my decease, any of said grandchildren should be under age, I direct that the share of such grandchild or grandchildren shall be receivable by a guardian or guardians of such grandchild or grandchildren, who shall keep the same invested in good securities, together with the interest accruing thereon; and upon the arrival of said grandchild or grandchildren, or either of them, at twenty-one years, shall pay to him or her, his or her share, as aforesaid; or, upon the death of either under age and without issue living at his or her decease, shall pay the same to and among the survivors of said grandchildren, equally as before provided. I expressly direct that no part of any money to which my said grandchildren shall become entitled, under my will, shall come into the hands of their father,as guardian, by loan or otherwise. I also direct that if my son John F. J.White shall make any charge or claim against my said grandchildren, or either of them, for any matter or thing previous to the death of their grandmother, Lucy McLanahan, such charge or claim shall be deducted from the amount above released to him upon said obligations; and he shall be liable to pay the amount of such charge or claim, in addition to what he would otherwise be liable to pay upon said obligations. The first named obligation I direct my executor to deliver up cancelled to the said John F. J. White, upon his releasing any and all claim or charge against my said grandchildren as aforesaid; and the second obligation I direct my executor to assign and deliver to the said grandchildren, or their guardian or guardians, as the case may be."

The will in question further devised and bequeathed all the residue of the testator's estate to four other of his

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grandchildren, viz: Sally Elizabeth White, wife of James Reed, John D. White, Edward White and King V. D. White.

The bill alleged that, pursuant to the direction of the will, the executor had assigned, by a written indorsement, and had delivered the obligation of John F. J. White for $2241.00, in the will mentioned, unto John Henry McLanahan, and to the guardians of Yelverton McLanahan and Sarah Anne McLanahan respectively; that he had proceeded to settle the estate of the testator, and was about to pass his final testamentary account; that there would remain in his hands an unappropriated balance of about $3000.00; that since the assignment and delivery of the said obligation of John F. J. White to the legatees, for whose benefit the same was bequeathed, it had been discovered that the said John F. J. White was wholly insolvent, and that he was so insolvent at the time of such assignment; and no part of said obligation could be recovered from him; that the parties to whom such assignment was made now claimed to be paid out of the estate of the testator a sum equal to that portion of the sum due on said obligation bequeathed to them by the testator; which claim, if allowed, would diminish *pro tanto* the present unappropriated balance otherwise payable to the residuary legatees; whereas, the residuary legatees insisted that the bequest to the said John Henry, Yelverton and Sarah Anne was a specific bequest, such as did not entitle them, upon failure to recover it, to be reimbursed out of the general estate. The bill prayed the instruction of the Court.

The answer of John Henry McLanahan and of Elijah G. and Sarah A. McLanahan by their guardians, admitted generally the facts stated in the bill; but alleged that the assignment by the executor to them of the obligation of John F. J. White was transmitted by mail and was not formally delivered and accepted; that, having heard, by

rumor, of the precarious financial condition of said White, these defendants refused to return to the executor a release on account of their legacy, as they were requested to do, but sent to him a bare acknowledgment of the receipt of the paper. These defendants insisted that the intent of the testator, who was their grandfather, was to bequeath to them something really beneficial; and that, upon a just construction of the said bequest, so as to effectuate the true purpose of the testator, it should be held to be, not a specific legacy in a technical sense, but a legacy of quantity in the nature of a specific legacy, that is to say, of so much money charged upon a particular fund as a convenient means of payment, which failing, the legacy ought, in equity, to be made up out of the general assets.

The answer of the defendants, James Reed and wife, John D. White, Edward White and King V. D. White, admitted the facts, as set forth in the bill, so far as they were informed; and, insisting that the bequest to the other defendants was of a specific legacy, claimed the whole unappropriated balance now in the hands of the executor.

Depositions were taken proving the insolvency of the John F. J. White at the time of the assignment of his obligation to the defendants, John Henry, Yelverton and Sarah Anne McLanahan.

The cause came before the Chancellor, at the Feb. T. 1859, for a hearing upon the bill, answers, exhibits and depositions.

E. G. Bradford, for the residuary legatees, relied upon the general rule respecting specific legacies, as being applicable, as well to the bequest of a debt as of a chattel or stock. The use of the word "my," "owing to me," "due to me," &c., or words of like import, are considered as rendering the legacy specific. 1 *Roper on Leg.*, 204. The

Argument.

present bequest is of that character; it is clearly a disposal of the identical debt and not a bequest of money, with a reference to the debt merely as a fund first to be applied. *Ambler* 309; 1 *Eq. Cas. Abr.* 302; 2 *Ves. Sr.* 568, 623; 4 *Ves. Jr.*, 555, 568, 750; 8 *Bro. Ch. R.* 160; 2 *ib.* 108; 5 *Ves. Jr.* 461; 2 *Madd. R.* 280; 1 *Jac. & Walk.* 302.

J. C. Patterson, for the McLanahan legatees.

General or pecuniary legacies are favored at law rather than specific ones; 4 *Bro. Ch. R.* 350, *note* (*c*); 22 *Pick R.* 299; and no legacy is held to be specific, unless demonstrably so intended, 4 *Ves. Jr.* 748, *note* (*a*). The general equity is in favor of the legatee whose legacy has failed from unforeseen causes. Where, therefore, a gift is made with reference to some specific fund, any indications of intention that it shall be paid have been held to take it out of the general rule. In *Deane vs. Test*, 9 *Ves. Jr.* 145, a bequest of £2000, "to be paid out of the 4 per cents," was held to be pecuniary. So, also, in *Kirby vs. Potter*, 4 *Ves. Jr.* 748, a legacy of £1000 "out of my Reduced Bank Annuities;" and in *Wilson vs. Brownsmith*, 9 *Ves. Jr.* 180, a legacy of "£200 four per cent. consolidated Bank annuities," was held not to be specific. In *Gillaume vs. Adderley*, 15 *Ves. Jr.* 384, a legacy of £5000, "now vested in the East India Company's bonds," was held not to be specific but general. So, in *Lambert vs. Lambert*, 11 *Ves. Jr.* 607, a bequest to a younger child of £12000 "of my funded property to be transferred in his name," &c. In *Roberts vs. Pocock*, 4 *Ves. Jr.* 150, legacies to be paid out of a specific security, which failed, were held general under the circumstances.

In the present case the relationship of the legatees to the testator and the whole scope of his will lead to the conclusion that he intended them a benefit not to be de-

feated by the insolvency of the debt which he designated as a fund for payment of the legacy.

THE CHANCELLOR, after holding the question under consideration, expressed the opinion that the bequest of the debt was specific, and decreed accordingly.

ELI LOGAN, JOSEPH C. GILPIN, Ex'r. of WILLIAM CHANDLER, dec'd., LEVI HAYES, JAMES SMITH, ISAAC JEFFERIS and the LANCASTER COUNTY BANK,

vs.

JOHN R. BRICK, EDMUND BRICK, JOHN B. MYERS and SARAH ROGERS.

Kent, March T. 1859

A voluntary conveyance, though without a fraudulent intent, is void, as against creditors, under the statute of 13 Elizabeth.

Such a conveyance is void *if it tend to hinder and delay creditors*, though it may not otherwise injure them.

The answers of the grantor and grantee in a voluntary conveyance, denying a fraudulent intent, though responsive to the bill, is no defence, since such conveyance is, as against creditors, a fraud in law, irrespective of the intent of the parties.

A conveyance being held fraudulent and void as against creditors, certain mortgages of the property conveyed, taken by the vendor by way of consideration, were nevertheless held good in the hands of an assignee for value without notice.

The answer of the assignee, denying knowledge of fraud in the securities

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assigned to him and alleging himself to be a *bona fide* purchaser, for value, being responsive to the bill, is conclusive, unless rebutted by two witnesses or by one witness with corroborating circumstances.

The assignee, in such case, having a collateral security for the money advanced upon the mortgages, was required, for the benefit of junior creditors against the mortgaged property, first to exhaust his remedy upon the collateral security.

A creditor having the security of two funds out of which he can satisfy his debt, upon one of which only another creditor has a junior lien, will be compelled in equity to resort first to the fund which the junior creditor cannot reach.

BILL BY CREDITORS TO SET ASIDE A CONVEYANCE.—This bill was filed by the complainants, judgment creditors of John R. Brick, one of the defendants, to set aside a deed from himself and wife, dated July 1st, 1851, conveying to his son, Edmund Brick, a large tract of land in Kent county, known as Bombay Hook Island, on the ground that the conveyance was voluntary, without consideration and in fraud of creditors.

The bill alleged that the grantor was, at the time of the conveyance, in failing circumstances; that the grantee was insolvent; that nothing was paid as the consideration for the conveyance, and that no security was given except four mortgages on certain parts of the lands conveyed, of $3816 each, which was said to be over and above certain mortgage liens existing against portions of the property, to wit: one to the assignee of Samuel Harrison Smith for $5000; one to Charles S. Coxe for $900; one to Rachel Rogers, assignee of William Pearson, for $750; one to William Chandler, assignee of William Pearson, for $2000, and another to Edmund Brick, assigned to Rachel Rogers, as trustee for Joseph Reeves, for $1233.34. A large portion of Bombay Hook Island was left uncovered either by the prior liens or the four new mortgages; the latter amounting to $15,264, and with the prior liens making up $25,000, the nominal consideration for the con-

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veyance of the property. It was alleged that the several mortgages to Rachel Rogers, to Charles S. Coxe and to Edmund Brick had either been paid off or were fictitious and fraudulent. The bill further alleged that the four new mortgages given by Edmund Brick had been assigned by John R. Brick to John B. Myers on the 8th of August, 1851; that such assignment was without consideration and made in order to carry into effect the proposed fraud on Brick's creditors. *Prayer*, that the conveyance from John R. Brick to his son Edmund Brick, also the four mortgages of the son to the father, and the assignment of them to John B. Myers should be decreed to be void; that the defendant, Myers, should re-assign the mortgages to John R. Brick; that Edmund Brick should re-convey Bombay Hook Island to his father, and that he should satisfy his pretended liens upon it; that Rachel Rogers should satisfy the mortgages standing in her name; and that payment of the debts due the complainants should be decreed out of the lands.

The answer of the defendant, John R. Brick, admitted his indebtedness to the complainants; also the conveyance of Bombay Hook Island to his son, Edmund Brick, on the terms charged in the bill, and the assignment of the securities taken from his son to John B. Myers; but the answer denied that either he or his son were insolvent at the time of the conveyance or that there was any fraud; and it set up, as the consideration for the conveyance, the prior mortgages existing against the property and the mortgages of the son for the balance of the purchase money—which, the answer alleged, were both taken and assigned in good faith; that the assignment was made, in addition to a mortgage of certain property in Philadelphia, for a loan of $24,000, made to John R. Brick by Myers, Claghorn & Co., which was afterward increased to $29,644, and which was duly applied to the payment of Brick's debts. The answer specially accounted for the mortgage liens of Rachel Rogers and Edmund Brick and alleged *bona fide* considerations for them.

Argument for complainants.

The answer of Edmund Brick denied that, at the time of the conveyance, either he or his father were insolvent or contemplated insolvency; and also denied the charge of fraud, either in the conveyance or in the assignment of the mortgages for the purchase money.

The answer of John B. Myers denied all knowledge whatever of any fraud in the mortgages assigned to him, alleging that although John R. Brick might, in fact, have been in failing circumstances, it was not then publicly known or suspected; that he took the securities in good faith and without suspicion, for cash loans made in the usual course of business.

Rachel Rogers, the other defendant, denied the charge of payment or fraud in relation to the mortgages held in her name, and set forth the consideration for them.

Issues were joined and a large body of evidence taken on both sides, chiefly bearing on the question of the insolvency of the two Bricks and their transactions. The material points of the testimony are stated in the opinion of the Chancellor.

The cause came before the Chancellor, at the March Term, 1859, for a hearing on the bill, answers, exhibits and depositions.

J. P. Comegys and *Joseph J. Lewis*, (of Penna.) for the complainants.

This case, when properly stated, is more than half argued. An insolvent father conveys to his insolvent son a large landed estate, known as Bombay Hook Island, in Kent county, worth $95,900, for an alleged consideration of $25,000. He receives no money, but takes his son's bonds, payable at dates running from three to six years—with mortgages on part only of the Island, for $15,264, that

being the excess of the alleged consideration above certain encumbrances on the property, amounting to $9,736. Edmund Brick, the grantee, did not covenant to pay the encumbrances; and his mortgage for the purchase money covered only part of the property conveyed to him, that is, seven out of the twelve tracts into which the whole body of the estate was divided. The five tracts not covered by the mortgage were encumbered only to the amount of $2,000, a sum very much less than their value; so that these tracts were, in effect, given to the son, without a dollar of purchase money. This was in July, 1851. Three months later, John R. Brick conveys to his son other property, in Philadelphia, subject to encumbrances against it, but, as before, without the payment of a dollar for it. Following these conveyances John R. Brick raises money by the sale to Myers of the mortgages taken for the purchase money; and thus, by the magic of a few paper writings, the son, without paying a dollar, takes the estate; the father pockets the money raised on the securities; and his creditors are expected to be kept at bay. Can this be done? We answer,

1. The deed was a voluntary conveyance and is void, as against creditors, under the statute of 13 Elizabeth. Whether there was *in fact* a fraudulent intent is not material. The conveyance, if voluntary, is a *legal* fraud upon the rights of creditors, and as such is within the statute. *Reade vs. Livingston*, 3 *Johns. Ch. R.* 500, 501; 1 *Sto. Eq. Jur. secs.* 355, 359, 360, *and note.*

Is then the deed voluntary? The pre-existing encumbrances, which in part made up the alleged consideration of $25,000, Edmund Brick, the grantee, assumed no obligation to pay. The grantor, and any other property he might have, remained bound. This continuing liability of the grantor makes the deed, to this extent, voluntary within the statute. *U. S. vs. Mertz*, 2 *Watts R.* 406. The

mortgages for $15,264 (the excess of the $25,000 over the encumbrances) covered only seven out of the twelve tracts which made up the property conveyed. The remaining five tracts were wholly without consideration; and the conveyance of these is rendered none the less void by the device of including all the tracts in one deed and alleging a fictitious consideration for the whole. On the contrary, the deed being fraudulent as to the five tracts is void altogether. The vice which taints it in part deprives it of all virtue, as against the creditors. *Whitting vs. Johnson*, 11 *S. & R.* 328; *Burke vs. Murphey*, *Miss. R.* 157; *Holland vs. Cruft*, 20 *Pick. R.* 321.

The defendants rely upon the general denial of fraud in the answers; but the denial goes only to the *motives of the parties*, and not to the facts which make the transaction *legally* fraudulent. The answers, therefore, are inconclusive on the question of fraud. What was the actual intent of the parties it is not material to inquire; but, if it were so, we insist that such a transaction could have been with no other purpose than to hinder or defeat creditors, which is fraud under the statute.

2. Another ground for avoiding the conveyance is that even if its effect be not ultimately to *defeat* creditors its tendency is to *hinder and delay* them. The bonds and mortgages for the purchase money were made payable at periods from three to six years, the first falling due in July, 1854; and thereby, supposing the bonds and mortgages to stand in place of the lands, all remedy on the part of the creditors was postponed. If, by such a contrivance creditors can be postponed for three years, why not for thirty? Such a wrong is within the contemplation of the statute. *Kepner vs. Buckhart*, 5 *Penn. State Rep.* 478; *Ashmead vs. Hean*, 1 *Harris R.* 584; 8 *Johns. R.* 451; 7 *Barr R.* 264; 16 *Penn. State Rep.* 488.

There remains another inquiry. The conveyance being

void for fraud as between the Bricks, how is Myers, the assignee of the mortgages for the purchase money, affected? He was not a *bona fide* purchaser, for value and without notice. He must have known of the insolvency of the two Bricks; that the mortgages were given for the whole of the purchase money; that they were upon long credits, and that there were other creditors to be affected by these transactions. At least, there were strong grounds of suspicion on the face of the transaction, sufficient to put him upon inquiry and to affect him with notice. *Johnson vs. Harvey*, 2 *Penrose & Watts*, 82.

But, supposing the assignment to Myers not to be vitiated by fraud, we then claim that as Myers holds a mortgage on property in Philadelphia for the same debt secured by the assignment of the mortgages on Bombay Hook Island, equity will oblige him to resort to the Philadelphia security first. This is the general rule of equity, where one creditor has securities upon two funds and another creditor a security upon one only. The creditor having cumulative securities shall so use them as not to prejudice the other having only the one. But, in this case, the rule is enforced by the additional equity arising out of the fact that the property covered by the mortgage in Philadelphia was bought by Edmund Brick expressly subject to the mortgage for Myers' claim, and with Brick's undertaking to pay it, so that to collect the debt under the Bombay Hook Island mortgages would be a fraud upon the other creditors.

G. P. Fisher and *C. S. Layton*, for the defendants, John R. Brick and Edmund R. Brick.

Fraud is not to be presumed, especially to set aside solemn conveyances. 1 *Mad. Ch. Pr.* 261. The *onus* of proof is always upon the party charging it; and, in the present case, the *onus* is greatly increased by the denial of the

Argument for defendants.

answer. The bill charges fraud generally; the answer denies it as it is charged, and is, therefore, sufficiently responsive to require two witnesses, or one with corroborating circumstances, to countervail it. 3 *Md. Rep.* 212; 7 *ib.* 587. Against this answer there is at most but suspicion, arising out of the relations and circumstances of the parties; but that is not sufficient. Even pregnant circumstances cannot make out a case of fraud against such an answer. 3 *Md. Rep.* 212; 3 *Md. Ch. Dec.* 29. John R. Brick has not been shown to be insolvent on the 1st of July 1851, the date of the deed. On the contrary, he was in full business credit, of which it is sufficient proof that a large portion of the claims of these complainants were contracted after the date of the conveyance. But, at all events, the conveyance was made for a valuable consideration, which was paid, *i. e.* by the purchaser taking subject to the prior liens, in part of the purchase money, and giving new securities for the balance, out of which securities the cash was raised. Actual payment of money is not necessary to validate a conveyance. A bond or mortgage is payment, if so made *bona fide.* 8 *Cow. R.* 430; 4 *Wend. R.* 306. The good faith of the transaction is demonstrated by the fact that the money raised on the securities was applied to John R. Brick's debts. Further, to avoid the conveyance, the purchaser must have been privy to the fraud, and there is no evidence against Edmund Brick. 2 *Mad Ch. R.* 556, 558; 1 *Mer. R.* 436; 5 *Conn. R.* 140; 4 *Kent's Com.* 464; 18 *John. R.* 514.

With respect to the argument that the conveyance, even if it did not defeat, at least tended to hinder and delay creditors, and so was obnoxious to the Statute of Elizabeth—the answer is that it had no such effect. The property sold for a better price on the credit given; and the money was realized at a small discount and applied to the debts. 5 *Penn. State Rep.* 478; 16 *Ib.* 492.

Opinion.

E. Ridgely and *N. B. Smithers*, for the defendant, Myers, relied on his answer as conclusive, in the absence of evidence to the contrary, that he took the securities without notice of any defect and for value paid. They also objected that the complainants could not put this defendant to exhaust his remedy against the property in Philadelphia before resorting to the assigned securities; that the complainants had their remedy by paying Myers' claim and taking an assignment. The general rule which compels a creditor having the security of two funds to resort to that fund which a junior creditor cannot reach, is subject to exceptions, and will not be enforced to the injury or prejudice of the creditor having the prior right to the two funds. *Evertson vs. Booth*, 19 *Johns. R.* 492. In this case the property in Philadelphia is heavily encumbered by liens prior to Myers' mortgage, and is not sufficient to cover it.

HARRINGTON, CHANCELLOR.—Part of the relief sought by this bill is that the mortgages held by Rachel Rogers against the property in controversy prior to the conveyance of it by John R. Brick to his son, may be set aside, on the ground of fraud in those mortgages. But Rachel Rogers by her answer positively denies the alleged fraud, setting forth the consideration of the mortgages, and the answer is supported by evidence. The creation of both of these mortgage liens on Bombay Hook Island was long prior, in point of time, to the conveyance of that property to Edmund Brick, the Pearson mortgage having been executed in January, 1848, and assigned in October, 1850, and the mortgage held in trust for Reeves made in 1849. They have no connection with the principal transaction which forms the subject of investigation in this case, and I have no hesitation in deciding that there is nothing established with reference to them, or to either of the mortgage securities exeeuted prior to the convey-

Opinion :—rule as to voluntary conveyance.

ance of this property to Edmund Brick, to impeach their validity or impair their lien to the amount which remains due upon them respectively, which amount is not, however, at least in the Coxe mortgage, the full amount for which it was given. I decide nothing as to what is due on these mortgages, but will simply dismiss the complainant's bill so far as relates to them and decree that they are valid securities.

But, with regard to the conveyance of July 1st, 1851, from John R. Brick and wife to his son Edmund Brick, I am of opinion that it was made under circumstances and for a consideration that will not sustain it in a court of equity as against creditors. And this, not because of any incompetency in a father to convey to his son, nor on the ground of actual, moral fraud, done or contemplated; but because it was a voluntary conveyance, made by a person in failing circumstances, being largely indebted to the complainants and others, and without any other consideration than the security furnished by a part of the property itself, upon time, which would delay, if not otherwise injure, these creditors. Such a conveyance is void by the Statute of 13 Elizabeth, even without actual fraud contemplated, though if made by a person on the eve of insolvency it is evidence of intended fraud. It puts the property out of their power, as a resort for the payment of existing debts, which a debtor has not a right to do, unless by a sale *bona fide* and for a valuable consideration. A father may advance his son by a conveyance of his land, even without other consideration than the relation between them, which is a good, though it is not a valuable, consideration; but he must do so with due respect to the rights of others, and if these be injured the conveyance is void as to them. If the grantor be indebted at the time, or is about to become indebted, and act with a view to protect his property from such debt—much more if he be on

the verge of insolvency—he cannot, by a conveyance to his son, deprive his creditors of their right to proceed against his property. The insertion of a nominal consideration, however adequate, secured only by new liens on the land and postponing the payment of the debts, does not change the character of the transaction. It is essentially a voluntary conveyance, affecting the rights of creditors, and is void as to them; and, being avoided, it leaves the property liable to the grantor's debts, as if it had not been made.

It was argued,indeed, by the solicitor for John R. Brick, that his answer denying the fraud, being responsive in this respect to the bill, was conclusive, unless rebutted in the usual mode of outweighing such denial; that the gist of the matter was the intent with which the conveyance was made, and that unless fraud was intended it could not exist. The answer to this is that, without any proof of intention, the fraud which vitiates this transaction attaches to the conveyance itself, as one which operates *in fact* to the injury of creditors, and is, therefore, prohibited by the statute of 13 Elizabeth as legally fraudulent. I might, therefore, decide the case on this principle; but there is more in it to make this conveyance obnoxious in a court of equity. The case is thus far made out by the bill and answers, which do not set up any other consideration, and which admit the indebtedness though not the insolvency of John R. Brick at the time. The answers deny that there was any fraud in the conveyance, either actual or purposed; but the transaction itself contravenes the just rights of creditors, at least to the extent of hindrance and delay, which makes it legally fraudulent and void. And,on the proof,it appears that John R. Brick was largely indebted at the time and rapidly approaching a state of insolvency, which he reached in a few months, and that both father and son were involved in the same calamity.

Opinion :—assignee of securities, whether affected.

Besides the very large indebtedness existing by bond and mortgage, it is in proof that John R. Brick was engaged in business transactions with Elijah Pugh, with Pugh and Brick, Bowers Lowber and others, in the course of which he was throwing out his negotiable paper almost without limit and on a foundation that threatened insolvency. His notes, checks and drafts, placed in the hands of Elijah Pugh to raise money, exceed $23,400, in the two months immediately preceding this conveyance; and those maturing in May, June, July, August and September, just before and after it, amounts to near $40,000. There can be no doubt that on the 1st of July, 1851, John R. Brick was largely indebted, and that his liabilities were increasing by his own act, so that he was rapidly approaching insolvency; and he did become insolvent shortly after. At this juncture he made a conveyance to his son of all his land in Delaware, for the nominal consideration of $25,000, and took mortgages on a part of it for $15,000, leaving it subject to the payment of prior liens created by himself. These mortgages he turned into cash by assignment to John B. Myers.

It is true, that he alleges in his answer that the money so raised was applied to the payment of his debts; but there is no proof on this subject, and the objection goes beyond this to the conveyance itself, which is legally void as being in fraud of creditors.

We next inquire whether John B. Myers is affected by this fraud, so as to be deprived of the benefit of the securities assigned to him? The bill charges him with complicity in the fraud; with being a mere trustee of John R. Brick and an agent with Edmund Brick to carry out the object of John R. Brick in putting his property beyond the reach of his creditors; or, failing proof of this complicity, the argument insists that John B. Myers had such knowledge, or means of knowledge, as he was bound to

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avail himself of before advancing money on these securities and thus making them available as the means of carrying out a conveyance fraudulent in law against creditors.

The answer of John B. Myers denies this knowledge and asserts that though John R. Brick might have really been in the failing condition established by the proof in the case, this was not publicly known at the time, and that the advances made to him were *bona fide*, upon unsuspected securities, in the usual course of cash loans actually advanced. I am of opinion that there is nothing in the proof in this cause to discredit the answer, and I cannot equitably relieve the complainants against these securities, which were taken for a valuable consideration and without notice of the objection to which the original conveyance between John R. Brick and Edmund Brick was liable. But these securities were taken by John B. Myers as cumulative, and in addition to mortgages which he already held on Philadelphia property as security for advances to Brick; so that, in fact, by understanding of the parties as well as by the rules of equity, he ought first to resort to the Philadelphia property for payment, and, failing that, to enforce these mortgages against Bombay Hook Island for what may remain unsatisfied. The rule is that when a party has two funds out of which he can satisfy his debt, and another creditor has a lien posterior in point of time on one of the funds only, the first creditor will in equity be compelled to resort to that fund which the junior creditor cannot touch, in order that the junior creditor may avail himself of his only security, when it can be done without injustice or injury to the debtor or creditor. 19 *Johns. Rep.* 492.

Let a decree be entered in accordance with the prayer of the bill, declaring void the conveyance, made July 1st, 1851, from John R. Brick and wife to Edmund Brick for Bombay Hook Island; also declaring void the four mort-

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gages executed by Edmund Brick to John R. Brick in consideration of said conveyance, saving the same as liens in the hands of John B. Myers, who is an assignee *bona fide*, for a valuable consideration and without notice, to the extent of his advances on the security of these and the other mortgages, amounting to $28,664.00; these mortgages to stand good to him only for what he may fail to realize out of the prior security taken for such advances on the Philadelphia property in Philadelphia; the bill to be dismissed as to the Pearson mortgage for $750,00 assigned to Rachel Rogers, and the Edmund Brick mortgage for $1233.34, which she holds in trust for Joseph Reeves; the costs to be paid by the defendants, John R. Brick and Edmund Brick.

JOSEPH C. GILPIN, executor of WILLIAM CHANDLER, dec'd.,

vs.

PARTHENA CHANDLER, and JOHN C. MURRAY and HANNAH his wife.

New Castle, Sept. T. 1859.

A decedent having, in his lifetime, held certain securities which after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the Court. The absence of the papers raises no presumption of such destruction or cancellation; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient.

A decedent held in his lifetime certain securities, to the amount of $1000, given for property conveyed to the separate use of his wife. He was at the same time indebted to her for money loaned him out of her

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separate estate, amounting, with interest, to about the like sum. After making his will, in order to satisfy her with its provisions, he had promised that the securities should not be enforced. The securities were not found among his papers after his death. *Held*, sufficient proof that he had voluntarily destroyed them.

BILL FOR THE RE-EXECUTION OF LOST SECURITIES. William Chandler, by deed dated August 18th, 1856, conveyed certain real estate to Hannah M. Jefferies, now Hannah M. Murray, one of the defendants, upon certain trusts for his wife, Parthena Chandler, for the consideration of $2000, expressed in the deed to be of the proper and separate funds of the wife. In part payment of the purchase money Hannah M. Jefferies, as the trustee, together with Parthena Chandler, executed and delivered to William Chandler five judgment bonds, bearing date the 18th of August 1856, each being for the payment of $200.00, and the several bonds being payable, with interest, in one, two, three, four and five years from date. The bonds were secured by a mortgage of the same date upon the purchased premises for $1000.00, executed by the trustee and Mrs. Chandler, payable in five annual installments, of $200.00 each, at the times fixed in the several bonds. William Chandler died on the 14th of October 1856, leaving a last will and testament, which contained sundry devises and bequests to Parthena Chandler, his widow, but making no reference to the before-mentioned mortgage and bonds.

This bill was filed by the complainant, as executor of William Chandler, alleging that the complainant, having learned that such mortgage and bonds had existed, had made diligent search for them among the papers of the testator, but without finding them; that he had also diligently inquired respecting them, and whether they had been paid; that the mortgage had not been recorded, nor judgment entered upon any of the bonds; that the complainant had reason to believe that no part of the debt secured by the said mortgage and bonds had been paid, and

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that they had never been assigned or disposed of by the testator, but, as the complainant believed and alleged, had been lost, mislaid, or had, by some means unknown to the complainant, returned to the possession of Mrs. Chandler or of the trustee; that Mrs. Chandler, in a conversation with one James M. Williams, shortly after the testator's death, admitted her indebtedness for a portion of the purchase money of the property conveyed to her by the testator. The bill alleged that inasmuch as the mortgage and bonds were not yet due the complainant was without remedy at law, and prayed that the defendants should be decreed to execute and deliver to him a new mortgage, with new bonds, of the same tenor and effect with those originally executed and which had been lost.

The answers of the defendants admitted the execution of the mortgage and bonds under the circumstances and for the purpose set forth in the bill; and that nothing had been paid on them; but it denied that the papers had ever come to the possession of either of the defendants, or that they had any direct knowledge as to what disposal had been made of them by the testator. Mrs. Chandler alleged that the testator had, in his lifetime, promised to release her from all obligation on the mortgage and bonds, in consideration of her acquiescing in a devise to her by his will of certain real estate in bar of her dower, and that she had rested on that understanding. Hannah M. Murray, (who was a daughter of Mrs. Chandler,) by her answer also alleged that like promises had been made to her mother by the testator in her presence. The answers insisted, as the ground of defence, that the testator had, pursuant to his promise to Mrs. Chandler, destroyed the papers in question.

Depositions were taken on the part of the complainant, proving the original existence of the bonds and mortgage in question; that search for them had been made among

the papers of the testator without success; and that nothing with respect to them appeared of record; also, that on one occasion, since the testator's death, Mrs. Chandler had spoken of them to one James M. Williams, a witness, as existing obligations, according to the understanding of the witness. There was evidence on the part of the defendants that, at several times, Mrs. Chandler had expressed to the testator her dissatisfaction with his will; that he had endeavored to satisfy her by saying that these securities "should never come against her." One witness stated that, while the testator was on his death bed, Mrs. Chandler expressed to him her acquiescence in his will, stating as her reason that he had released her from this debt; and the witness understood him silently to assent.

The cause came before the Chancellor, at the Sept. T. 1859, for a hearing upon the bill, answer, exhibits and depositions.

W. S. McCaulley and *D. M. Bates* for the complainant.

It is objected to our claim to have these bonds and the mortgage replaced, that they were not originally effectual securities, Mrs. Chandler being a married woman when she executed them, and Hannah M. Jefferies only a naked trustee. But, against Mrs. Chandler, though a married woman, the securities were good, as binding her separate estate; and as to Hannah M. Jefferies, she was a necessary party to the mortgage, having the legal title to the land mortgaged. The decree should be that Mrs. Chandler execute new bonds, and the trustee a new mortgage. 2 *Kent. Com.* 163.

Again, it is objected that the mortgage, not being recorded, became no lien. This matters not. The mortgage, though not a lien, was evidence of debt. The omission to record it, however it may bear as evidence on the

Argument for defendants.

question of Chandler's having destroyed it, affects not the complainant's right to have it replaced, if only lost.

But the main objection is the alleged release. To this we answer that the proof is insufficient. All presumption in such a case is against a release. The *onus* is on the party setting one up; and such a defence is to be sustained by clear and unquestionable proof. The evidence relied on is of loose conversations, proved by biased witnesses, who are members of Mrs. Chandler's family: it shews at best only the efforts of the testator to pacify his wife's discontent at his will; and, as to what he did say in these conversations, the witnesses fail to agree, some representing him as saying he *had* released, and some that he *would* release. Against these impressions are the facts, that *after his will was made* Chandler took these securities and must then have intended their payment as not to be affected by his will; that, so far as proof goes, he never did in fact cancel or destroy them; that whatever promises he made to pacify his wife were without any consideration, since she still holds the check given by him for $500.00, and her promise to abide by his will was not binding; that his omission to record the mortgage is accounted for by his sickness and speedy death; and that Mrs. Chandler after his death admitted her indebtedness on it. Her answer, denying such admission, is evasive and unsatisfactory; and being, further, contrary to all the probabilities of the case, it is not sufficient, even against the one witness. The Court is not bound to believe the answer against the testimony of one witness, who is sustained by all the circumstances, and on that ground entitled to greater credit. 1 *Smith's Ch. Pr.* 272, *note* (6) *and cases cited.*

T. F. Bayard, for the defendants.

The securities claimed were void as to Mrs. Chandler,

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then a married woman, in their inception. This is a sufficient answer. Further, the mortgage never became effectual for want of being recorded. But we have a defence upon the merits, viz: the release. The papers are not traced out of Mr. Chandler's possession. Both the defendants deny any knowledge of them, and there is no proof to the contrary. Whatever disposal, therefore, was made of them must have been by Chandler himself; and what that was the proof sufficiently explains. We have his promise, proved by several witnesses, made on different occasions, that these securities should not be enforced. The consideration was ample. Mrs. Chandler was not to claim a debt due from him of $500, amounting, with interest, to $960, almost the amount of the bonds. Besides this, she was to abide by the will, which she has done. It is a fair presumption, amounting to proof, connected with the non-production of the papers, that he had in good faith destroyed them; but, were it otherwise, the circumstances raise in favor of the widow a sufficient equitable defence to induce this Court to withold its aid for the restoration of the securities.

HARRINGTON, CHANCELLOR.—I need not decide anything with reference to the legal effect of these papers as securities; for, if they be merely lost, as is assumed by the bill, I can restore or reproduce them in the same condition they are proved to have been in, leaving it to the courts of law to decide what they are worth. But the point of this case is, whether they are lost merely, or whether they have been destroyed so as to annul them. Nothing short of that—not even proof of a declared purpose by William Chandler at some future time to annul them—will prevent a decree for their re-production, if he did not in fact annul them, though such an intention, or the declaration of it, may aid other proof of the fact of their destruction by him, so as to prevent their being operative

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as securities to charge his widow. And, on this question, I agree that the party alleging such destruction is bound to make it out to the satisfaction of this Court; and he has the *onus*, unless the proof of the existence of the papers at the time of Wm. Chandler's death and of the manner they were then held by him necessarily connects itself with their existence as operative papers; and then it belongs to the general proof in the cause, as the complainant has to show the existence of operative securities at that period.

I do not think, therefore, though I at first inclined to give some force to it, that in this case there is much weight to be given to the question on which party the burden of proof lies. The question is, whether the complainant is entitled to a decree for the substitution of certain valid securities, alleged by him to have been such at his testator's death and to be now lost or mislaid?

The loss of these papers is proved, ineffectual search having been made for them at the proper place; and it is also proved that they at one time existed as valid securities. William Chandler sold property in Wilmington to his wife and conveyed it to a trustee for her, she paying from her own funds a part of the purchase money and executing these bonds, and also, with the trustee, the mortgage, as securities for the balance. But, it also appears in proof that the mortgage was not recorded; that it was designedly kept from record,which raises a doubt whether, at William Chandler's death, it was held by him as a security. To this is added, for the purpose of strengthening that doubt, proof that Mrs. Chandler, the obligor in these securities, had many years before they were executed, loaned her husband $500.00, of her separate money, and that she held his check for this sum uncollected; and that William Chandler, after having made his will and informed her of its contents, promised, in consideration

of this fact and in order to satisfy her with its provisions, that the mortgage should not be put on record nor enforced against her. Several witnesses prove that William Chandler, at different times, told his wife that she should be satisfied by the provisions of his will and that these securities should not appear against her (that being the point on which she was dissatisfied;) and one unimpeached witness, Mrs. DeNormandie, proves a conversation between him and his wife, under very impressive circumstances, in which she said that she was now satisfied, giving as the reason that he had released her from this debt; to which statement he silently assented. To this is to be added the fact that the papers have not been found since his death, and it is not imputed that the defendants have them.

On the other hand, there is evidence in the deposition of James M. Williams that Mrs. Chandler referred to these papers as existing obligations after the death of her husband.

In this conflict on a question of mere fact I must decide the case upon the conviction produced by the testimony on my own mind; and from this I believe that William Chandler, in his lifetime and shortly before his death, made way with these papers in fulfillment of his promise that they should not be a charge against his wife. I believe that he held them from the first with an undetermined purpose as to using them; that the testamentary dispositions he made of his property, a just regard to the claims of his wife, and a disposition to satisfy her—all made it proper that neither the check which she held against him nor the bonds and mortgage he held against her should be enforced. It is, therefore, reasonable and probable that he should have done what he is proved to have promised to do, to relieve her of the charge which was evidenced by these papers; and, under the circumstances, the natural and the easiest mode of doing that was by

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destroying the papers themselves. I think I am fully justified in deciding the case on that ground, by his acquiescence in the declaration of his wife, made in his presence just before his death and assented to by him, that he had released her from this obligation.

Decree dismissing the bill, with costs.

PHILIP J. GROSE and JAMES M. GROSE,

vs.

JAMES MCMULLEN and WILLIAM W. FERRIS, Executors of James McMullen, dec'd.

New Castle, Sept. T. 1859.

A bond held by a decedent at his death, though not yet due, is assets for the payment of debts, and may be sold under a decree.

To exonerate the personal estate of a testator from the payment of debts, it is not sufficient that the real estate be charged. It must appear from the will, either expressly or by clear implication, that the testator intended to exonerate the personal estate.

The testator, at his death, held a bond for $7,000.00 not due for a number of years. By his will he bequeathed to his wife an annuity of $420.00, corresponding with the annual interest on the bond; and also gave some pecuniary legacies at her decease. His lands were charged with debts, and a portion of them directed to be sold for the payment of debts. *Held*, not sufficient to exonerate the bond from liability for a deficiency after applying the residue of the personal estate and the proceeds of lands directed to be sold.

The deficiency having been paid by devisees of the residuary real estate, relief granted by marshaling assets.

BILL TO MARSHAL ASSETS.—James McMullen, by his

Argument.

will, dated October 22d, 1856, directed the payment of his debts, and for that purpose that certain of his real estate should be sold. The residue of his real estate he devised to the complainants in fee simple, but with a proviso that this clause of his will should not take effect until all his debts should be paid. He bequeathed certain legacies, among which was an annuity of $420.00 to his widow, during her life; and at her decease three legacies, of $500.00 each, were to take effect.

Among the personal assets of the testator was a bond executed by Stephen Townsend for $7,000.00, payable in the year 1863. The personal estate and the lands specifically charged with the testator's debts proved insufficient; and the creditors proceeded for the deficiency against the lands devised to the complainants. Thereupon, this bill was filed by the complainants against the executors, claiming to be reimbursed out of the bond of Townsend, and praying that it might be sold for that purpose.

No issue of fact was raised by the answer of the defendants, and the case was heard before the Chancellor at the Sept. T. 1859, upon the equities arising out of the facts as set forth in the bill.

T. F. Bayard, for the complainants.

There can be no doubt that the bond of Townsend is assets for all purposes under the statute, which expressly declares all goods to be assets, with very limited exceptions. *Rev. Code*, 300, *sec.* 16. This bond is none the less assets, though not due at the testator's death. A debt is not affected in its nature, nor in any of its legal incidents or consequences, by the question whether it is due or not due. An illustration of this point is afforded by the rule that an administrator cannot pay a simple contract debt, though due, before paying a bond not due. *Toller on Ex'rs.* 282;

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2 *Wms. on Ex'rs.* 876. Then, since the bond is part of the personal assets, it was subject to the debts in relief of the lands devised to the complainants, notwithstanding the lands were charged with debts. The mere charge of debts on lands does not exonerate the personal estate from its primary liability. To have this effect, there must appear from the will, either expressed or necessarily implied, an intention not merely to charge the real estate, but so to charge it as to exempt the personal. 2 *Wms. on Ex'rs.* 1450; *Bootle vs. Blundell*, 1 *Mer. R.* 193. It must plainly appear that the testator meant to change the order of payment. 1 *White & Tudor's Lead. Cas. in Eq.* 622, *notes*; 638, 647. The rule requiring the evidence of intention to be clear is more stringent where the effect of exonerating the personal assets is to charge devisees than where the land to be charged descends to heirs.

G. B. Rodney, for the defendants.

I do not controvert the general rule as stated by Mr. Bayard; but it is controlled in this case by the apparent intention of the testator. It is evident from the frame of the will that Townsend's bond for $7,000.00 was in the testator's mind set apart to serve the annuity bequeathed to his widow—the interest on the bond being the exact amount of the annuity. It should also be observed that after her death legacies are given, which must have been intended to be provided for out of this fund. The implication is sufficiently clear of an intention to exempt this fund from debts, especially considering that they are by the terms of the will charged on the real estate.

Mr. Bayard, in reply.

The whole defence rests upon the correspondence between the annuity and interest on the bond. This is a

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mere coincidence, accompanied by no explanation in the will, and is in itself too slight a ground to vary a general rule for the administration of assets.

THE CHANCELLOR considered that the bond, although not yet due, was assets for the payment of the testator's debts; and that it was not exempted by the mere charge of the debts on real estate; that the will must show an intent, express or implied, to exonerate the personal estate, and that in this will such intent is not sufficiently demonstrable. A decree was entered to marshal the assets, and ordering a sale of the Townsend bond for that purpose.

CHARLES T. FLEMING, Trustee of the real estate of BENJAMIN POTTER, deceased,

vs.

HENDERSON COLLINS, Adm'r. of JOSHUA S. LAYTON, deceased, and the heirs of the said decedent.

Sussex, Sept. T. 1859.

The cutting of timber is an injury of an irreparable nature and remediable in equity, by whomsoever committed.

Equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed.

Upon the death of the party committing the waste the liability to account survives against his administrators.

BILL TO RESTRAIN WASTE AND FOR AN ACCOUNT. The complainant was trustee under the will of Benjamin Pot-

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ter, deceased, of certain real estate devised to charitable uses. The bill was filed against the heirs at law and the administrators of Joshua S. Layton, deceased; alleging that he, in his life-time, had cut timber on part of the trust estate, and praying an injunction against further waste; also praying an account of the waste committed and payment of the amount. The defendants who answered alleged that Joshua S. Layton was in possession of the premises at the time of Potter's death, and claimed title in himself by purchase from C. S. Layton, the former owner; that the land had been vacant, was taken up by C. S. Layton and by him sold to Joshua S. Layton, who cut the timber as the owner; that Potter had no title and was never in possession. The defendants admitted the cutting. The bill was taken *pro confesso* as to Henry A. Layton, one of the heirs at law.

Before the final hearing of the case an issue was directed to try the title to the land in controversy by a jury at the bar of the Superior Court. The jury found the title to be in the complainant, as trustee of the Potter estate.

Depositions were taken by both parties touching the amount and value of the wood cut.

The cause came before the Chancellor, at the Sept. T. 1859, for a hearing upon the bill, answers, exhibits and depositions, and the verdict found on the issue directed.

W. Saulsbury and *E. D. Cullen*, for the complainant.

The title is established by the verdict, and nothing remains but to prove the waste. The proof shews that timber was cut, to the injury of the inheritance, and the value of it. That is waste, and gives equitable jurisdiction of the subject. 2 *Sto. Eq. Jur. sec.* 200; *Eden on Inj.* 249, 199. The Court, having jurisdiction of the subject, will proceed to give full redress, so as to prevent a multiplicity of suits.

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Therefore, it will not only restrain further waste but ascertain by an account the waste committed, and decree payment. The party who committed the waste being dead the redress for the waste committed survives against his administrators.

C. R. Layton and *C. S. Layton*, for the defendants.

This is not a case of waste. There is no community of title. Joshua S. Layton held possession, claiming the exclusive title, and cut timber as owner of the land. The verdict, finding the title to be in Potter, made the cutting by Layton a trespass, remediable only by an action at law for damages against his administrators. 1 *Chitty Pl.* 81, 83. They are not subject to an account in equity. 2 *Johns. Ch. R.* 169. How can administrators file an account for waste committed by the intestate in his life-time? They know nothing about it. As to the heirs, they are in no way affected by a trespass committed by their ancestor.

HARRINGTON, CHANCELLOR.—The verdict upon the issue concludes the question of title, and leaves nothing to be decided but whether waste, such as is the subject of equitable jurisdiction, has been committed, and the amount of it. The cutting is undisputed, and the amount and the value of the timber cut is proved. That it is the subject of equity jurisdiction there can be no doubt. For, the cutting of timber is an injury irreparable in its nature, and by whomsoever committed is remediable in equity. The remedy by injunction in such cases, has been greatly extended, and is applied even to restrain trespasses which are irreparable. *Coop. Eq.* 152; *Eden on Inj.* 199; 6 *Johns. Ch. R.* 497. The Court having jurisdiction to restrain waste will do complete justice by decreeing an account and satisfaction for the waste committed; and the party committing it having died, the liability to account survives

against his administrators. In the present case there is already sufficient proof for a final decree; but if the parties desire an opportunity for further proof, I will direct an account.

Both parties preferred a decree upon the present proofs; and, accordingly, a decree was entered against the administrators of Joshua S. Layton, deceased, for $125.00, as the value of the waste.

STEPHEN S. SOUTHARD,

vs.

SAMUEL A. PRICE, JR.

New Castle, Feb. T. 1860.

After argument of a cause at the final hearing, leave granted, under the circumstances, to exhibit interrogatories to take additional testimony and for a further hearing.

BILL IN EQUITY, for the correction of an alleged mistake in the consideration of a note given under the circumstances following:—

The complainant, on the 24th of December, 1856, purchased from the defendant the interest of the latter (being one-third) in the partnership effects of Pedrick, Price & Co. The parties made a calculation, with the partnership books before them, in order to ascertain the value of the defendant's interest, the result of which was that his interest was estimated at $11,000, for which sum the complainant gave his promissory note at four months.

Statement of the case.

The bill alleged that in April, 1857, the books being posted, it was ascertained that a mistake to the amount of $1685.67 had been made in the estimate of profits for the year 1856, which affected the value of the defendant's interest as the same had been calculated on the 26th of December, 1856, when the purchase was made by the complainant. The bill charged that the complainant's note for $11,000 was given and accepted expressly subject to the correction of any errors which might afterward be discovered in the estimate of profits for the current year; and the complainant claimed to deduct from the note the amount of the mistake alleged to have been discovered. *Prayer*, for an injunction against an action at law pending for the collection of the note in full.

The answer alleged that the calculation of the 26th of December, 1856, was made only with a view to approximate the value of the defendant's interest; that at the close of it the defendant proposed to sell his interest for $11,500; that the complainant then offered for it $11,000, payable at four months, which the defendant accepted and the bargain was closed. The answer wholly denied that there was any agreement or understanding for the correction of errors; and insisted that the note was an absolute and unconditional security.

The case was argued at the March Term, 1860, at a final hearing upon the bill, answer, exhibits and depositions, by *E. G. Bradford* and *D. M. Bates* for the complainant, and *J. C. Patterson* and *J. A. Bayard* for the defendant.

In the course of the argument, upon the examination of the partnership books, two questions of fact, affecting the value of the defendant's interest, were much controverted, viz: whether certain goods of the partnership, lost in the schooner "Camilla," and charged in the account at the end of the year 1856, were lost before or after the 26th of

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December; and whether the account of stock taken at the end of that year, or after, was so taken with the defendant's knowledge and sanction, so as to make it evidence against him.

At the close of the argument the complainant's solicitors filed an affidavit of the complainant that the goods on board of the "Camilla" were lost before the 26th of December, 1856; also that the defendant was present at the taking of the account of stock after the close of the year 1856. They, thereupon, moved for leave to file interrogatories to take testimony on these points and for a further hearing. They argued that, as they had the right to dismiss their bill and proceed *de novo*, it was better for all parties to take the testimony in the pending case than in another. They cited 2 *Dan. Ch. Pr.* 998; *Gresley's Eq. Ev.* 133.

The defendant's solicitors resisted the motion. They filed a counter affidavit of the defendant.

HARRINGTON, CHANCELLOR.—The complainant is entitled to a preliminary decision of this motion; for, though the importance of the new testimony sought to be introduced depends, in one aspect of the case, on a decision of the main question; namely, the complainant's equity to have the mistake corrected after it is shewn, his application for a further opportunity to shew its existence must be disposed of before I can proceed to a final decree. He may avoid that decree by dismissing his bill without prejudice, and impose, while he incurs, the expense of an entirely new case. And, if he is entitled to correct the alleged mistake, I could not proceed to a final decree without the further evidence; for it is admitted now that the profits of the partnership for 1856, cannot be ascertained without an account of stock at the end of that year.

I do not wish to decide this case prematurely, nor by

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installments. I do not wish to hurry a decision when either party has not offered all the evidence in his power belonging to the case. It is not yet an old case, and no one will suffer by the delay necessary to take the testimony proposed, while both parties might be subjected to further and more expensive litigation by a decision excluding this testimony. I, therefore, grant the complainant's motion.

At the same time, I expressly forbear any expression of opinion with regard to the merits of the case, and shall be entirely at liberty to dismiss the bill finally, after proof of a mistake in the estimate of profits, if, either by the agreement of the parties or on general principles of equity, such mistake is not, under the circumstances, open to correction.

Appeal prayed, but not taken.

The case was afterward compromised.

RICHARD N. MERRIKEN,

vs.

DANIEL C. GODWIN, CURTIS S. WATSON, JAMES R. LOFLAND and THOMAS WALLACE.

Kent, March T. 1860.

The substitution of a new security for one in which a party became originally bound as surety does not convert him into a principal debtor.

An indorser of a promissory note, after its maturity and his liability on it

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had become fixed, joined with the maker of the note in a bond giving further time, at his request. *Held*, that he was surety on the bond and not a principal.

The surety in a bond, upon tender of the debt, is entitled under the statute to an assignment of the bond, if demanded; and a refusal to make such assignment is a discharge of the surety *per se*, irrespective of the question whether, in consequence of such refusal, the surety has sustained injury.

The fact that an inequitable use might be made of the security assigned, as against the creditor, does not absolve him from making it, nor prevent the refusal of it from operating to discharge the surety. He should assign the security and afterward resist the inequitable use of it.

Quere: What would be the effect of proof that the assignment was sought *for the purpose* of making an inequitable use of it?

Tender of payment to one of several creditors and a demand from him of an assignment of the security, although the security may not be in his possession, binds all the obligees, and his refusal is equivalent to the refusal of all.

To a charge in the bill that the complainant was surety in a bond, and as such entitled, on payment, to an assignment of the bond, it is not a responsive answer to allege that he is not entitled to the equity of a surety because by an agreement made at the time of giving the bond he was precluded from the protection now sought by the assignment. Such a defence must be proved *aliunde*.

BILL TO RESTRAIN THE COLLECTION OF A JUDGMENT.—The bill alleged that the complainant became bound, as the surety of Richard Chambers, in a judgment bond to the defendants, dated Oct. 1st, 1856, for the debt of $300.00, payable on the 1st of November then next; that the bond was given in part of the purchase money of a printing press which the defendants had sold to Chambers for $790.35; that for the balance of the purchase money, $490.35, Chambers gave to the defendants his bond, without surety, on which last bond a judgment was entered in the Superior Court for Kent County, on the 9th of June, 1856, and a *fieri facias* issued, returnable to the Oct. Term following, and levied upon the printing press and fixtures. A *venditioni exponas* was issued, April 1st, 1857, and return-

Statement of the case.

ed to the April Term, 1857, "*tarde venit.*" No further writ was issued to the Oct. Term, 1857, nor until the 20th of January, 1858, when an *alias vend. exp.* was issued to the April Term, 1858, and returned, "stayed." On the 10th of June, 1858, an *alias fi. fa.* was issued, under which a new levy was made upon the same goods before levied on, viz: the printing press and fixtures, and also, as the bill alleged, upon some other materials which Chambers had added to his stock. On the 15th of June, 1858 a *plu-ries vend. exp.* was issued to Oct. Term, 1858, which had not been returned. Under these writs the printing press and fixtures had been sold, and the proceeds were held by the Sheriff. Chambers had no other property.

The complainant finding that the defendants had by the failure to continue their execution process from term to term, as well as by lapse of time, lost their priority of lien, under the judgment for $490.35, under the original levy, as against any subsequent execution creditor, desired to pay off and obtain an assignment of the $300 bond, in which he was surety, so that he might enter a judgment on that bond, and by a levy on the printing press, fixtures, &c., secure himself. The bill alleged that he had, at sundry times between the 15th and 26th of June, 1858, endeavored to pay the bond, and on the 28th of June, not being able to find the other defendants, he had made a legal tender of the money to Curtis S. Watson, one of the obligees, demanding an assignment of the bond; that Watson refused to receive the money or make the assignment; that under such assignment the complainant could have protected himself in his suretyship by a levy upon the printing press, fixtures, &c. The bill alleged that a judgment had been entered against the complainant on the bond for $300.00, and a *fieri facias* issued, which was now pending. *Prayer*, for an injunction.

The answers of the defendants alleged that the $300.00

for which the bond of Chambers and the complainant was given, was originally secured by Chambers' promissory note, at ninety days, indorsed by the complainant, which note matured and would have been protested, the parties being unable to pay, but that, at the complainant's request, it was substituted by the judgment bond; and the answers insisted that the complainant, having been fixed with his liability upon the note for which the bond was given, stood in the bond as a principal and not as surety. The answers further alleged that at the taking of the promissory note and also at the substitution therefor of the judgment bond, it was expressly understood and agreed between the parties, that the defendants should have, under their judgment on Chambers' bond for $490.35, a priority of lien, by execution and levy on the printing press and fixtures; and the answers denied that any goods were sold under the *alias* levy which were not covered by the first levy; or, at least, any more than were applicable to rent.

The answers admitted that the complainant, at sundry times, expressed a wish to pay off the bond in which he was bound, and take an assignment; but they denied any tender of the money and demand for the assignment, as to any of the defendants except Watson, who admitted the interview alleged in the bill to have taken place between him and the complainant on the 28th of June, but stated that he had not then the bond, and never had it, and could not make the assignment; that he referred the complainant to the defendant, Wallace, who held possession of the bond. The defendants all denied any purpose to prevent the complainant from paying the bond, or any refusal to receive the money and make the assignment. The defendants denied that the complainant was entitled to an assignment, being as before stated not a surety on the bond, which was given in satisfaction for his previously fixed liability: also, the defendants insisted that the complainant

Argument for complainants.

was precluded by his express agreement from using the bond, had it been assigned, to defeat the levy of the defendants under their other bond: also, the defendants further insisted that the complainant had suffered no prejudice from the want of the assignment, since, before it was demanded, the defendants had renewed their lien, under the judgment for $490.35, by a new levy on an *alias fieri facias* under that judgment, which would have been effectual against any remedy of the complainant under such assignment of the $300 bond.

Depositions were taken at large on both sides. The material points of the testimony are stated in the opinion of the Chancellor.

The cause came before the Chancellor at the March T. 1860, for a hearing upon the bill, answers, exhibits and depositions.

E. Ridgely and *N. B. Smithers*, for the complainant.

The complainant's liability in the bond is only as surety. The consideration for the note was a printing press sold to Chambers. It is undisputed that he was surety on the note. The bond was a substituted security for the same debt, and it did not change complainant's relation to it. 3 *Barb. N. Y. Rep.* 314; 11 *ibid* 159.

As surety, the complainant was entitled to an assignment of the bond upon payment or tender of the debt. This was his right on general, equitable principles, further secured and enforced by the statute. *Rev. Code*, 186.

Then, did he tender the amount of the debt and demand an assignment; and was it refused? That is the decisive question. It is in proof that he called upon all the obligees successively. First, he asks Godwin, who was Register of Wills in Dover, to bring up the bond, which the

latter neglects to do. Then he goes to Milford and calls on Wallace, who calculates the amount due on the bond, but tells complainant he cannot have an assignment because Godwin is out of town; then he finds Lofland, who refuses an assignment unless it is made conditional. He then waits in Milford from Saturday until Monday; calls again at Wallace's store; finds him gone; then calls on Watson, tenders him the full amount as calculated by Wallace, and demands an assignment, which is refused. What more could the surety do? Next, what was the legal effect of Watson's refusal? It discharged the surety absolutely. Payment or tender to one joint obligee is payment or tender to all. If one can receive payment for all, it is his duty to procure an assignment by all, and his refusal affects all. Its direct operation is to discharge the surety; for it deprives him of his right to be subrogated to the security as a means of protecting himself. 3 *Barbour R.*, 314; 11 *ibid* 159; 7 *Price Exch. R.* 223; *Theob. on Pr. & Sur.* (1 *L. L.*) 123.

The refusal of the assignment was a discharge of the surety *per se.* It is of no consequence whether in point of fact the security would have availed him. The question is whether he was deprived of his right, not how much he was injured in consequence. 2 *Am. Lead. Cas.* 308, 327; *Theob. on Pr. & Sur* (1 *L. L.*) 73; 7 *Price Exch. R.* 223. It is, therefore, wholly immaterial to inquire whether or not the *alias fieri facias* renewed the lien on the printing press.

With respect to the alleged agreement, giving priority to the lien under the first bond, we say that no such agreement is proved; and the answer, in alleging it, is not responsive to the bill. The inquiry of the bill was whether the complainant was a surety. The answer should be yes or no. There was no obligation to answer further: the obligation to answer is the measure of its effect as evidence. Qualifications or matters of defence relied on to avoid the

effect of the answer to the point inquired of are not evidence as being responsive. 12 *G. & J.* 365 ; 15 *Vermt. R.* 93. This rule is more stringent in equity than at law. 3 *Greenl. Ev.* 281.

G. P. Fisher and *D. M. Bates*, for the defendants.

Merriken was a principal in the $300 bond and not a surety. It was given upon a new consideration, viz : the giving further time on a debt in which his liability had become fixed. For this indulgence he gave the bond ; and, as a consideration for its acceptance and for the indulgence given, he agreed that nothing should be done to impair the security of the other bond.

Again, he made no sufficient tender of the money and demand for an assignment. To Godwin he only talked about paying : to Wallace, who having the bond might have raised the money and made or procured an assignment, he made no tender whatever, though the amount due was then calculated : to Watson, the offer to pay was on a condition he could not comply with, for he had not the bond and could not assign it. There was to none of the defendants a *bona fide* tender, nor was there any refusal. It is questionable even whether there could be a legal tender to one only of several obligees; for all constitute one debtor, and an assignment by all is necessary. There was no effort, nor even proposal, for a meeting of the defendants to receive the money and make the assignment.

Further, a refusal to assign a bond, even to a surety, does not discharge him *per se*. Our statute attaches no such consequence to the neglect to assign ; and sufficient force, without this, can be given to its provisions,—as that a surety shall not be bound to pay without an assignment, if he demands it ; and that he may go into equity and compel an assignment ; and further, that he will be discharged

in equity if, in consequence of the refusal to assign, he is damaged. This is the whole extent of the statutory obligation. There are no adjudged cases on this question, because the right to an assignment of the principal security is not a general right but is conferred by the statute. The general right in equity is to an assignment of collateral securities on payment by a surety of the principal one. Now, no case can be found holding that a refusal or neglect to assign a collateral security to the surety is a discharge *per se*; but such effect is given only on proof of injury, and so far the rule applied in equity to collateral securities sustains our construction of the statute. 2 *White & Tudor's Lead. Cas.* 37. 1 *Sto. Eq. Jur. sec.* 325.

Then, the case is open to the inquiry whether Merriken did sustain any injury from not having the assignment. On this point the proof is conclusive. Chambers had no property but the printing press and fixtures, and these Merriken could not have reached under the bond had it been assigned. For, in the first place, though the old levy had lost its priority, the *alias fi. fa.* was issued and the lien renewed on the 14th of June, before any assignment was sought. But, aside from this, Merriken was bound by his express agreement, on giving the $300 bond, and as part of the consideration for its acceptance, not to interfere with the priority of the other bond, under which the levy had been made. The evidence of this is the sworn answer of all the defendants made in response to the bill and not met by counter proof. The responsiveness of an answer does not consist in its being a categorical reply to a statement in the bill, but in its supplying the discovery sought by the bill. The discovery sought was not barely whether the complainant was a technical surety, but whether he was a surety having the right to an assignment on payment of the debt. That was the charge made by the bill; and the answer meets the charge directly by showing that, in con-

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sequence of his agreement,he was not a surety having such right. This answer is not a confession and avoidance. It sets up no new matter distinct from and collateral to the charge of the bill. 2 *Ves. Jr.* 242: 1 *Cowen R.* 742: 7 *Ves. Jr.* 567.

HARRINGTON, CHANCELLOR.—The original connection of the complainant with the debt for which the defendants have judgment and execution was that of an indorser and surety to Chambers; and I do not think this character changed by his subsequent execution of a bond, in connection with Chambers, to take up the note. He is still a surety merely; and is entitled to all the benefits of that relation in a court of equity, though the form of his obligation be changed from indorser of a note to co-obligor in a bond. He remains bound for the same debt, and one in which he had no other interest or participation than as surety of another.

As such surety, his bill assumes that he had the right, under chapter 65 of the Revised Code, to have it assigned to him, on payment of the amount due; it alleges that such assignment was refused and insists that, as a consequence of such refusal, he is in equity released from the obligation of payment, without his being obliged to show how he could have indemnified himself and avoided loss by means of the assignment.

I do not know that the question, as a legal principle, has been settled under our statute; but I am unable to distinguish between the right of a surety, founded on the general equitable doctrine of subrogation, to have an assignment of collateral securities, or to have them used for his protection, and the same right as secured by express legal enactment. If a creditor gives time to a principal debtor, so as to put it out of his power at any time to subrogate the surety on payment of the debt by him, he discharges him without any reference to the use he might be able to make

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of the power, were it transferred. The question is as to the existence of the right and not as to the source whence it is derived; and it can have no less force whether granted by positive enactment or derived from general principles of equity. The statute is express, that when any persons are bound in any bond, &c, and the money due thereon, &c, shall be paid, or tendered, by a surety therein, the obligee shall be obliged to assign such bond, &c., to such surety.

The principle on which the right, however derived, is founded is, that a surety, on paying the amount for which he is bound, shall be entitled to have all remedies against the real debtor placed under his control; and if the creditor, by agreement with the debtor, disables himself for any time to give the surety this power he discharges him.

Without going into the evidence in detail, I think, a tender of the money due upon this bond by the complainant to Mr. Watson, one of the obligees, is proved; and that it thereupon became his duty to make an assignment under the statute promptly, or in such time as the circumstances would admit of. He could not, at the moment, transfer a paper which was not in his possession; but from the time of the tender actually made it became his duty, and that of his co-obligees, to receive the money and make the assignment. The previous interviews had with each of the other defendants, though looking towards this object and showing a degree of solicitude on the part of the complainant to make good his right of substitution, imposed no obligation to do the act until the money was tendered; but from that time the duty became imperative and the consequence of not complying with it attached.

But, it is said, that even if the complainant was a surety in this bond, and though generally a surety has the right to an assignment and to the use of the remedies which such assignment would give him against his principal, this is

not a case where any such equity exists, because the complainant agreed, when he became surety, that the original bond and judgment against Chambers should have a priority of lien before the bond in which he became bound.

This brings up the question whether such agreement is proved, and what, if proved, would be its effect upon the surety's right to an assignment of the bond.

And first, *as to the proof of it.* The agreement is positively alleged in the answers (all of them,) and no doubt was in fact made; but the question I am to consider is, whether it is legally proved. A defendant's answer is evidence only where he is made a witness by the statements and interrogations of the bill; and when his answer states matter not averred by the bill, or beyond it, it is the statement of the defendant's case as a party, and it must be established by other proof. Now, the bill here states that Richard N. Merriken was a surety in this bond, and that, as such surety, he was entitled, on its payment, to a transfer of the security; that he tendered the money, which was refused, and demanded the transfer, which was not made. The answers, submitting first that he was not a surety and denying the tender, sets up further that he is not entitled to the equity of a surety, because when he became such he made a certain agreement which would prevent him in equity from using the transferred obligation of Chambers, for which he was surety, in the way he purposed to use it, that is, by obtaining a preference of lien on the printing press and fixtures. This new phase of the case, depending upon new facts, to which the complainant does not even allude, must be established in the regular way, by proof, or it must be rejected by the chancellor. However high the moral weight of the statements by which it is supported, it is of no legal weight in the scales of justice.

But, in the next place, *as to the effect of such agreement*, were it proved—I do not see that because a right to the as-

Syllabus.

signment might be abused, or used against equity in the particular case, the defendants are justified in refusing it, on demand and payment of the money. Was it not clearly the legal course to award to the complainant his right to an assignment and afterward resist the illegal or inequitable use of it? Or, if such inequitable purpose in demanding the assignment (and the purpose is avowed in the bill) would be a sufficient answer to the complainant's case in a court of equity, the facts which show the purpose to be inequitable and in opposition to positive agreement must be proved in the case; and the proof here fails, outside of the answers, which, on the principle stated, cannot be taken as evidence.

It is, therefore, my opinion that the complainant is entitled to the relief asked for in his bill, and that the injunction heretofore granted must be continued. Let a decree be entered accordingly, with costs.

JAMES L. HOUSTON and RHOADS HAZZARD,

vs.

WILLIAM J. HURLEY and LEVIN J. MEARS, administrators of STEPHEN HURLEY, deceased.

Sussex, Sept. T. 1860.

A purchaser, under a contract for the sale of land, who has accepted a deed and entered into possession will, nevertheless, be relieved in equity against a defect of title afterward discovered by him, *if fraud in the sale was practiced upon him by the vendor*. Otherwise, *it seems*, if the deed were accepted *in the absence of fraud*.

Statement of the case.

The right to rescind a contract for fraud must be exercised promptly after the discovery of it.

A purchaser under a contract for the sale of land accepted a deed and entered into possession in December, 1854, soon after which he discovered that the land had been sold, before the conveyance to him, for unpaid taxes; but he continued in possession until 1858, when, without eviction, he abandoned it. *Held*, that after so long delay he was not entitled to wholly rescind the contract; but *held also*, that a portion of the purchase money remaining unpaid, a court of equity will restrain the collection of it until a good title be made.

A surety in a debt for which judgment is recovered against the principal is not discharged by a stay of execution, if such stay is required by statute, although it is entered as given by consent of the plaintiff.

Nor is such surety discharged by a mere stay of execution after a levy.

But if goods levied upon under the execution have been released by the creditor, without the surety's consent, the surety is discharged *pro tanto*.

BILL IN EQUITY, filed under the following circumstances:—

Stephen Hurley, the defendant's intestate, sometime prior to Nov. 13th, 1854, by a contract in writing, agreed to sell and convey to James L. Houston, one of the complainants, by "a good and sufficient title," a tract of land situate in the State of Maryland, known as the "Moreign tract," described as containing 511 acres, more or less, for the sum of $2000, to be paid as follows: $50 in cash at the date of the contract, and the residue in notes of $500 each, with surety, payable six months apart. The contract was executed by a deed dated Nov. 13th, 1854, upon receiving which Houston paid Hurley $250 more in cash, gave three notes, each for $500, and one for $200, with Rhoads Hazzard as surety, and entered into possession. The land in question had been purchased by Hurley on the 8th of August, 1853, at a sale by order of the Court of Chancery in Maryland, and a deed for the same was executed to him by a trustee of the Court, Sept. 30th, 1854. In December, 1853, the land was sold to Thomas H.

Statement of the case.

Webb by a collector of taxes for back taxes due in the years, 1849, 1850, and 1851. No deed had been executed by the collector. Houston, after having taken possession and made some improvements, abandoned the property in 1857, when Webb, the purchaser at the collector's sale, entered. After the notes given by Houston matured suits were brought on them in Maryland, and judgments were recovered against Houston (Hazzard, the surety being *non est*) with a stay of execution for four months, under the law of Maryland. Execution was afterward issued and levied on goods; but, by Hurley's consent, the goods were released from the levy and taken away by Houston, and the execution was stayed. Afterward, and without further exhausting his remedy on the judgment in Maryland, Hurley brought suits in Delaware, to recover the four notes from Houston and Hazzard.

The bill was filed to enjoin the suits in Delaware. It alleged that at the time of the conveyance by Hurley to Houston the title to the land was defective by reason of the collector's sale; that Hurley knew of the defect and fraudulently concealed it; that no covenants of title were made in Hurley's deed, the complainant being induced to waive them by the representation of Hurley's counsel that the title was good and that covenants of title were not necessary in a deed made by a trustee of the Court. The bill further alleged that, although the contract and the deed called for 511 acres, there were in fact only 280 or 300 acres in the tract conveyed; also, that Houston accepted the deed without knowledge of the defect of title or of the deficiency in the quantity of land. The bill further insisted that Hurley, having obtained a judgment on the notes in Maryland, could not afterward sue on them in Delaware; also, that the stay of execution and release of the levy on goods had discharged Hazzard, the surety. *Prayer*, for an injunction against the actions upon

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the notes—absolutely as to Hazzard, and as to Houston, until the title should be perfected, and until the defendants had exhausted their remedy on the judgment in Maryland.

The answer denied the charge of fraud, alleging that Hurley sold and conveyed the land to Houston in good faith and without knowledge of any incumbrances; that Houston, in 1854, accepted the deed in performance of the contract, held the land in possession until 1857, cut timber to the value of $2000, received rent to the amount of $300; that he was not evicted, but abandoned the possession by connivance with Webb, as a pretext to avoid paying the notes; that the land was not sold for taxes *before* Houston took possession; that if sold, it was by Houston's neglect in not paying up the taxes; that he bought the land knowing that Hurley had just purchased it at the *trustee's sale*, and that he was buying only what Hurley took at the sale. The answer further insisted that the surety had not been discharged by the proceedings in Maryland.

Depositions were taken on both sides. The evidence, so far as it was material, is stated in the opinion of the Chancellor.

The cause came before the Chancellor, at the March T. 1863, for a hearing upon the bill, answer, exhibits and depositions.

McFee and *Layton*, for the complainants.

The equity of the bill rests on several grounds, viz:

1. *The fraud of Hurley.* According to the evidence he contracted to sell the land to Houston in the fall of 1854, stipulating expressly for "a good and sufficient title." A year previous, in December, 1853, the same land

had been sold to Webb for taxes. Hurley had no title when he undertook to sell to Houston. The constable's receipt at the sale for taxes, though without a deed, carried an equitable title. At the least, Hurley's title was fatally encumbered: it was not such as he agreed to convey. Nor can it be doubted that Hurley, when he contracted with Houston, had knowledge of his defect of title. Such knowledge of facts affecting his own title, occurring a year previous, is fairly to be presumed. But Webb's testimony proves, additionally, that Hurley knew of the sale. The deed itself shews fraud on its face, in the absence of the usual covenants for title. It is, then, a case of *actual fraud.* Further, even supposing Hurley sold in ignorance of the defects of title, and was innocent of fraud, there is none the less a failure of consideration for the purchase money. In either view, Houston upon discovering the defect, though after having accepted a deed, was entitled to rescind the contract and to abandon the land without waiting to be evicted. 2 *Parsons on Cont.* 278–9; 1 *Sugd. on Vend.* 324–5. 1 *Sto. Eq. Jur.* 141.

2. *As against Houston* the notes for the purchase money were merged in the judgment recovered against him in Maryland prior to the suit in Delaware; and as to him they could not be again sued on. 1 *Chitty's Pl.* 105. 1 *Bull. N. P.* 182, *n. a.* At all events, Hurley's administrators were bound to exhaust their remedy in Maryland before suing for the same debt here.

3. *As to Hazzard, the surety in the notes*—he was discharged by Hurley's giving time to Houston under the judgment; also by his releasing the levy he had acquired upon Houston's goods. On recovery of the judgment a stay of execution until the next term was entered by consent, which was giving time to the principal. Again, after execution and a levy on Houston's goods, the levy was released by order of Hurley, and the goods were de-

livered to Houston. All this was to the prejudice of the surety, and upon settled principles discharged him. 1 *Madd. Ch. Pr.* 190; *Burge on Suretyship* 206; *Nisbet vs. Smith*, 2 *Bro. Ch. Rep.* 579; *McDowell vs. Bank of Wilmington and Brandywine*, 1 *Harring. R.* 383; *Tindal vs. Brown*, 1 *T. R.* 167; *Theob. on P. & S.* 127, (1 *Law Lib.* 75.)

Moore and *C. M. Cullen*, for the defendants.

1. The case shews no fraud nor failure of consideration for the notes. Hurley's deed to Houston conveyed "a good and sufficient title." The sale for taxes, being without any deed from the collector, passed no title. It is true, Webb, the purchaser, testified that his title was confirmed by an act of Assembly. But there was no proof of such act; and, had there been such proof, no legislative confirmation, without the collector's deed, could divest Hurley's title. His title, at the date of the deed to Houston, was therefore good until it should be impeached, which might never be; and although Houston, while the matter stood in contract, might have refused to take the title in this condition; yet, having accepted a deed and entered into possession, he could not afterward abandon the land without an eviction. 1 *Sugd. on Vend.* 324, *sec.* 28. 2 *Ib.* 126, *sec.* 7; 130 *sec.* 9; *Abbott vs. Allen* 2 *Johns. Ch. R.* 519; *Johnson vs. Gere*, *Ib.* 547; *Griswold vs. N. Y. Ins. Co.*, 1 *Johns. R.* 213; 2 *Kent. Com.* 471, 473. It is the settled rule that a party intending to repudiate a contract must do so at the earliest occasion. 1 *Sugd. on Vend.* 324, *n.* 2; 2 *Ib.* 10, *sec.* 29; 130, *see.* 11. Here, Houston, after he knew of the difficulty, continued in possession, paid taxes, cut timber, received some rent and submitted to a judgment for the purchase money. He has made money from the land, and cannot now be permitted to repudiate the bargain—at least, without accounting for what he has made under it.

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The imputation of fraud on the part of Hurley is not sustained by the proof. The weight of evidence is that he contracted to sell to Houston in the fall of 1853, which was before the sale for taxes in December following. He could then have had no knowledge of such sale; nor is he proved to have known of the back taxes. He had himself purchased only in the August previous. Houston knew that Hurley had but recently bought the land and had not yet got the deed. This was sufficient to put him on his guard. Looking then at the whole case, it is not one for relief on the ground of *fraud;* and as to the embarrassment of the title, the complainant has, by accepting it and taking and continuing in possession, precluded himself from rescinding the contract without an eviction. The proper remedy for a purchaser, upon a defect of title discovered after he has taken a deed, is by suit upon the covenants of the deed; but Houston chose to accept a deed without covenants, and he must abide the consequences.

2. The recovery of judgment in Maryland on these notes does not bar a suit here. Hazzard was not served with process there. The notes are both joint and several. 1 *Chitty's Pl.* 42 *a.* Nor was Hazzard discharged, as surety, by the proceedings in Maryland. The stay of execution, on recovery of the judgment against Houston, was compulsory, being given under the law of Maryland. As to the release of the levy, there is no sufficient evidence. It was in writing and cannot be proved by parol. But, giving the release its full effect, it was only of a part of the principal's property, and could operate only as a release *pro tanto. Theo. Pr. and S.* (1 *L. L.*) 85; *Baker vs. Briggs*, 8 *Pick. R.* 121; 14 *U. S. Dig.* 542, *sec.* 58; 5 *Ib.* 820, *sec.* 160.

HARRINGTON, CHANCELLOR.—The proof in this case establishes a written contract by the defendant's intestate,

Opinion:—statement of proof.

Hurley, to sell to Houston, the complainant, the "Moreign" tract of about 511 acres of land, and to make him "a good and sufficient title" to it, for the consideration of $2000—a small part to be paid in cash, and the balance to be secured by three notes, of $500 each, with complainant, Hazzard, as surety. The notes were made, and Houston went into possession. The contract is without date, and the time of making it uncertain; the complainants alleging that it was in the fall of 1853, and the defendants that it was in the fall of 1854; which latter date seems the more probable. It was certainly several weeks before the 13th of November, 1854, on which day Hurley executed and Houston accepted a deed conveying the "Moreign" farm, of about 511 acres, but without any warranty of title against incumbrances.

It is proved that Houston had knowledge that the Hurley title was derived through a sale of the "Moreign" tract by a trustee, under an order of the Court of Chancery in Maryland, since the trustee's deed is dated on the same day with his; and the Ennals grant to Moreign, referred to therein, is the same described by the trustee's deed. This is also admitted in the bill, by the statement that a lawyer, alleged to have been Hurley's, represented that covenants of title were not necessary, as the title was derived under a trustee's sale in chancery. The trustee's deed is in evidence, but his authority (recited in it) is not otherwise proved, the chancery record having been ruled out of the case for want of authentication. The Moreign title prior to this is in evidence, i. e. the Ennals deed. Indeed, it is not attacked beyond the chancery sale; but the complainant alleges that the title given him was not "good and sufficient," because the land was incumbered by old, unpaid taxes, and in fact had been sold, according to law, for the non-payment of these taxes, to one Webb, who claimed a right to the farm, and who it seems entered after the

Opinion:—rule as to rescinding purchase after acceptance of deed.

complainant, Houston, left it. To this it is replied, that such a sale by the collector, for non-payment of taxes, would not transfer title, without deed ; and that, though it would have been good ground for the complainant to refuse the deed of Hurley as a compliance with his contract to make "a good and sufficient title," yet that Houston, by accepting the deed on the 13th of November, 1854, precluded himself from denying the sufficiency of the title as a full compliance with the previous agreement, and that he cannot, after accepting that deed, abandon the contract, nor even resort to Hurley for a defect of title, otherwise than under the covenants of the deed. This position is tenable upon the assumption that there was no fraud practised upon Houston. It is with this qualification, viz ; the absence of fraud that Sugden lays down the rule, when he says that generally a purchaser, after a conveyance, has no remedy except upon the covenants he has obtained, although evicted for want of title, and however defective the title may be, if there is no fraudulent concealment on the part of the seller ; that the purchaser's only remedy is under the covenants. 1 *Sugd. on Vend.* 324. It is true, that there are no covenants in this deed, and that Houston is therefore remediless, if he accepted it without being deceived; and the fact that he accepted so meagre a deed as this, without a single covenant or assurance, as the performance of an agreement to convey "a good and sufficient title," when the land was covered with incumbrances for tax, and had in fact been publicly sold for taxes, does not itself prove the fraud, though it is important in considering whether Houston was in fact defrauded by the willful concealment of these things by Hurley and the designed entrapping of him with so imperfect and unusual a deed.

This then, is the main question in the cause—whether there was fraud ; for though Houston may be deprived of legal remedy for want of proper covenants in this deed,

and though, by his receiving it and holding the land under it for some years, he may even be debarred by his laches from putting an end to the contract—yet,if the fraud is established, a court of equity will relieve ; and it will not allow proceedings at law to go on against him for the purchase money until the title is perfected.

Incumbrances must be paid off by the vendor before he can compel payment of the purchase money, if discovered before the conveyance. 2 *Sugd. on Vend.* 124. After conveyance executed, if the vendor was aware of the defect of title, and concealed it from the purchaser, it is a fraud, and the purchaser will be relieved in equtity. 2 *Sugd. on Vend.* 132.

The decisive question in the case is, did Hurley know and conceal from Houston the tax incumbrances and the sale for taxes, by which the title was brought into dispute ? He could not perform his agreement to give Houston "a good and sufficient title" when the title was thus in dispute ; and, without a disclosure of the facts to Houston, his bare deed of bargain and sale, without any covenants, was a fraud on him, and does not deprive him of the right to be relieved in equity from paying the purchase money.

There is no evidence in the case that Houston knew of the delinquent taxes, or had any information of the sale by the collector to Webb and the consequent defect or dispute of title in Hurley, until after the execution of this deed. He states this in his bill positively. Before he contracted for the land he lived at a distance, and the collector's sale, if not made prior to his contract, was made many months before his deed. It is entirely probable, then, that this sale was unknown to him ; while Hurley, being in the neighborhood of the county town and being interested in the sale, which was public, was likely to know and, according to direct proof, did know of the sale. Yet, neither the fact

Opinion:—right to rescind to be exercised promptly.

of this sale nor the existence of the tax incumbrances was disclosed to Houston; while the giving an unusual deed, without warrants, under the advice, as the bill alleges, of Hurley's lawyer that a chancery title did not require warrants, are abundant evidence to my mind of tacit, if not of active, fraud.

Does this fraud annul the contract of sale, or justify Houston in abandoning the property, as he did?

The rule on this subject is that the right to rescind a contract for fraud must be exercised promptly after discovery of the fraud.

Houston states in his bill that he heard of the collector's sale subsequently to the execution of the deed, which was in 1854; and, being then in possession of the land, he was required to act promptly on this information. The time he first heard of it is not stated; but, from his removal to the neighborhood and the publicity of the fact, he must be taken to have known it soon after the time he mentions as not having heard any thing of it. Yet, he continued in possession of the farm for several years, paid the taxes as late as 1858, and afterward abandoned the premises, without eviction or any legal attempt by Webb to turn him out of possession.

This is not the promptness required, and I think he had no right at that time so to abandon the purchase; but, I think, he is entitled in equity to refuse further payment of the purchase money until he gets the title he bargained for, namely, "a good and sufficient title" against any lawful claims of Webb, or his alienee, and also discharged of the back taxes which Hurley was bound to pay. 2 *Sugd. on Vend.* 124.

Another question arises in the case, with reference to the complainant Hazzard. He is the surety of Houston in the four notes, amounting to over $1700, on which proceed-

Opinion :—as to surety effect of stay of execution.

ings were had in Maryland, judgment obtained against Houston, with a stay of execution for four months by consent, as the record expresses it, execution afterward taken out and levied, the levy released and execution stayed by agreement,and the goods levied on taken away by Houston, with Hurley's consent. This is relied on as releasing the surety.

But it is objected, in the first place, that the release being under Hurley's hand, is not sufficiently proved by the sheriff's deposition. This objection mistakes the point on which the question rests, which is, not whether the release to the sheriff from the responsibility of executing his writ can be proved, as a release, without its production, but it is whether the fact of lifting the levy, releasing the goods and staying the execution discharges the surety.

It has long been settled that giving time to a principal, by agreement, discharges a surety; 1 *Harring. Rep.* 369; and that even the accepting of a judgment, with a limited stay of execution, without the surety's consent, releases him; and the reason is that such an arrangement puts it out of the creditor's power to proceed at any time, or to authorize the surety to proceed, and thus puts him in a worse condition.

But it appears here that the judgment in Maryland against Houston was taken with a stay under an act of assembly, and that the plaintiff's consent to the stay was by the act necessary to his obtaining the judgment. It also appears that the stay of execution, after the levy, was merely a suspension of active proceedings, and did not prevent the plaintiff from proceeding again at any time. A surety is not discharged by mere indulgence or delay in suing or executing the principal. 1 *Russ. R.* 381.

Lifting the levy and releasing the goods levied on is another thing, and is an injury to the surety to the amount

Opinion:—as to surety, effect of release of levy.

of the property released. If the benefit of some securities for a debt is lost by the neglect of the creditor, the surety is *pro tanto* discharged. 2 *Sim. & Stu. R.* 457.

The goods levied on in this case were a certain security for the payment of this judgment, in which Hazzard was interested, and the release of them, without his consent, was an injury to him, to the amount of their value.

A creditor is even bound to keep other property, pledged for a debt for which he has security, for the benefit of the surety; and, if he parts with it, he releases the surety to the amount of the property given up. 8 *Pick. Rep.* 121.

I am, therefore, of opinion that the release of this levy on Houston's goods was an injury to his surety; and, being without his consent, it is a release of his obligation of suretyship to the extent of the value of the goods given up. This can be ascertained with reasonable accuracy in any proceeding hereafter taken to charge the surety, since the levy and inventory will be shown by the sheriff's return. But I do not know of any decided case, and cannot perceive any principle of equity, that will make such a stay of proceedings and release of goods levied on an absolute release of the surety. It does him no wrong beyond the value of the goods released. The creditor has the right to forbear execution; and the surety has a remedy, if he desires it, to obtain further execution.

The decree will, therefore, be to continue the injunctiou of proceedings at law against Houston and Hazzard, on the notes given for the consideration of the "Moreign" farm until a good and sufficient title shall have been made to Houston, according to the agreement; and that beyond this the defendants shall be prohibited and enjoined from ever proceeding against Hazzard, the surety in these notes, to the amount of the value of the goods of Houston levied on under the judgment and execution in Maryland and surrendered by the plaintiff in that execution; and that the defendants pay the cost of this suit.

Statement of the case.

ROBERT FRAZER,

vs.

WILLIAM FRAZER.

Kent, March T. 1861.

Ordinarily, the party alleging insanity is bound to prove it. Insanity is not presumed.

But, general insanity being proved, the *onus* is upon the party setting up any act as binding to prove that it was done in a lucid interval.

By insanity is not meant a total deprivation of reason, but only an inability from defect of perception, memory and judgment, to do the act in question.

By a lucid interval is not meant a perfect restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and to do the act with such perception, memory and judgment as to make it a legal act.

The reasonableness of an act is evidence of the rationality of the actor. The fixedness of purpose to do it, is further evidence of stability, and, therefore, of rationality: but if the act is not shewn to be reasonable it derives no strength from a continued purpose to do it.

BILL TO SET ASIDE A CONVEYANCE.—This bill was filed to set aside a deed executed by James Frazer and wife, on the 5th of October, 1854, conveying to the defendant, who was one of his sons, a farm in Kent County, being the farm on which James Frazer had resided, for the consideration, as specified in the deed, of $2,000. The bill alleged that James Frazer, the grantor, had been insane since the year 1830; that from 1837 until 1842 he was an inmate of the Insane Asylum at Philadelphia; that he was brought home without any material improvement in his mental condition, and from 1842 to 1853 he was at times confined

Statement of the case.

in the Alms House of Kent County, and from that year until his death in 1859, he was generally in the Alms House; that he had been out of the Alms House only two weeks before the execution of the deed on the 5th of October, 1854; that on the night of that day he had a violent attack of mania, which made it necessary to remove him back to the Alms House; and that, on the 5th of October, 1854, he was legally incompetent to convey his property or to transact any business. The bill alleged that the defendant gave his bond for $1700 as the purchase money, but had never, in fact, paid anything; that the consideration specified in the deed ($2,000) was grossly inadequate, the farm being worth $4,000; and that the defendant, on the execution of the deed took and still held possession of the farm. The bill charged that the deed was fraudulent and void, and that the title to the premises had, upon the death of James Frazer, intestate, descended to his heirs at law, of whom the complainant was one and entitled to one-third; that although James Frazer had left a will, he had died intestate as to this real estate.

The defence relied upon by the answer was that James Frazer, although a lunatic, had lucid intervals, during which he was capable of transacting business, and that the conveyance in question was made in one of these intervals. The answer alleged that it was made upon James Frazer's own proposal to sell the farm to the defendant for $2,000, reserving to his wife, the defendant's mother, the use of certain parts of the dwelling house after his death; that the defendant, together with his mother, was then living with his father and carrying on the farm for the maintenance of the family; that the consideration was reduced from $2,000 to $1,700, after the deed was prepared, at the instance of James Frazer, for the reason, assigned by him to the conveyancer, that the farm would not rent for more than $100. The defendant admitted that he had not paid

any part of the bond for the purchase money, but alleged that the same had been disposed of by James Frazer's will, and that he stood bound for it. The answer wholly denied the alleged inadequacy of the purchase money.

A large body of testimony was taken, on both sides, to shew the mental condition of James Frazer; also proving various estimates of the value of the farm. The conveyancer, Samuel B. Cooper, who, on the 5th of October, 1854, prepared the deed, and also James Frazer's will, and superintended their execution, testified that, in his judgment, Frazer was on that day rational and capable of understanding the business transacted; that Frazer had previously requested the conveyancer's attendance and explained his reasons for the proposed disposal of his property. The material parts of the testimony are referred to in the Chancellor's opinion.

The cause came before the Chancellor, at the March Term, 1861, for a hearing upon the bill, answer, exhibits and depositions.

E. Ridgely and *N. B. Smithers*, for the complainant.

G. P. Fisher and *J. P. Comegys*, for the defendant.

HARRINGTON, CHANCELLOR.—At the hearing of this case, before argument, being satisfied that it was a case proper for trial by a jury, I offered an issue to either party who might desire it, which, after consultation, was declined by both sides. I did so neither from a sense of difficulty in the case, nor of delicacy in deciding it, but of duty with reference to a case involving a mere question of fact, on which question I shall now express an opinion.

No material difference was apparent in the argument, as to any question of law bearing on this question of fact, though there was some slight discrepancy in the mode of

stating the principles of law and in the authorities cited. But this whole matter has heretofore been so fully considered in our Courts, and my own opinion so fully expressed in the case of *Duffield vs. Morris' Ex'r.*, 2 *Harring. R.* 375, that, without controverting the points of that decision, they may be said to rule this case.

Insanity is not presumed. Ordinarily, the proof of it rests on the party alleging it. This *onus* changes when the condition of the subject is changed, and the party is proved to have been insane. Then, the party setting up any act as binding must show that it was done in a lucid interval.

By insanity is not meant a total deprivation of reason, but only an inability, from defect of perception, memory and judgment, to do the act in question. So, by a lucid interval is not meant a perfect restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and to do the act with such reason, memory and judgment as to make it a legal act. The defendant has to establish that in this case.

James Frazer was an insane person, at intervals, from the year 1830. He was generally insane, with intervals either of calmness or restoration, from that time till the beginning of 1854. He was insane, with intermissions but without restoration, after 1854 till his death in January, 1859. He was often raving; often in lunatic asylums; generally, from 1851, in the Alms House, and constantly there from about the time of this transaction, though at that time for a few weeks he was out of the Alms House.

From the current of testimony, he was incapable of doing any business for many years before his death, and did not do any business with the single exception of the act in question and two others—the execution of a will and the making of an affidavit. The officer who took the

affidavit did not observe any want of mental capacity, and the witnesses to the will and to the deed now in question make the usual proof of capacity. But the fact of general insanity was not known to the former, and the judgment of the latter is now to be tested.

On the 5th of October, 1854, James Frazer—who, for many years, had been in the general condition of an insane person, usually confined to the Alms House, but sometimes supposed to go out during intervals of calmness or lucidity, in one of those intervals executed this deed, under circumstances that impressed the draftsman and witnesses with the idea of entire competency to do the act with a proper mind. He gave the instructions, gave reasons which, if true, were good reasons for making an unequal division of his property, estimated values, stated his previous purpose to do the act, which is proved by Mr. Cooper, and behaved as a man doing a rational thing in a sensible way. Opposed to this is evidence of the previously existing and immediately following state of insanity, the want of proof *aliunde* of the reason he gave for advancing his son William, and the conflict of testimony in regard to his conduct and condition on the day and night of the execution of the deed.

The reasonableness of an act is evidence of the rationality of the actor. The fixedness of purpose to do it is further evidence of stability and, therefore, of rationality; but if the act is not shown to be reasonable it derives no strength from a continued purpose to do it. James Frazer's repeated offers to convey his land to Joseph Nickerson, though proving a fixed purpose, did not prove rationality, any more than the reason he gave for it which was not a true reason. The assigned reason for making this deed was to equalize the distribution of his property, because of advances before made to his son Robert, of which there is no proof other than his own statement, and

this reason is not consistent with the other, stated by him and now maintained by the defendant, that the farm was sold at its real value. Beyond a doubt, this is not so. The farm was worth $3500. Its rental value was $175 or $200. He estimated it at a rental of $100, and conveyed it for $1700, either because that was the worth of it or because he had before advanced the other children. The first reason is not true, the second is not proved. All the witnesses, including one for the defendant, put the value at what I have stated, the exceptions being only the other two witnesses to the deed, one of whom does not know with any accuracy the size of the fields nor what they will produce, which weakens materially, in my mind, the force of their judgment on the main question. I would not impeach the honesty of either of these witnesses, and I have great respect generally for the judgment of Samuel B. Cooper; but when he deposes that there was nothing about this transaction to excite even a suspicion of James Frazer's competency, whom he knew to be generally insane and just out of a mad house, his judgment reducing the value of the land at least one-half, when such reduction is necessary to prevent such suspicion, loses much of its weight.

This deed will have to find support, therefore, from extrinsic circumstances, as there is nothing in the transaction itself so much in accordance with reason and propriety as to induce the conclusion that it was the act of a man of competent capacity.

And, considering where the burden of this proof lies, I have no hesitation in saying that the deed is not supported by extrinsic evidence. On the contrary, the evidence of long continued and often violent insanity in the grantor, of his general incapacity to do any business, of the fact that he did not do any thing requiring the use of judgment for a long time prior to the execution of this deed,

Syllabus.

and that he was regarded by his family as so incapable; considering also the evidence of others than the attesting witnesses as to his condition on the day of the execution of the deed, the same night, the next day and even after, I do not think that the deed was the act of a person capable of executing a valid legal instrument. I refer especially, on one of these points, to the condition of James Frazer immediately before, on and after the day the deed bears date, and his conduct at the time of its execution, to the deposition of Rachel C. Killen, and finally, and conclusively to my mind, to the testimony of Doctor Cowgill and the other medical gentlemen who treated his disease, and of Thomas Purnell who for a long time kept him, all of whom considered him insane.

Let a decree be entered declaring the deed void.

WILLIAM RICHARDS, trustee for SARAH SHERON, wife of JAMES SHERON.

vs.

JOSEPH SEAL, administrator, c. t. a. of RACHEL SEAL, deceased, and SAMUEL N. PUSEY, administrator of JOSHUA T. SEAL, deceased.

New Castle, Feb. T. 1861.

Mere negligence of a trustee, as well as his active default, may be a breach of trust.

Ignorance of the act or default of a co-trustee is no excuse, if that ignorance results from neglect.

Statement of the case.

An investment of a trust fund having been made by trustees, one of them without the knowledge of his co-trustee, collected the fund and held it until his death without re-investment. *Held*, that the co-trustee, who had given no attention to the fund after its original investment, was liable.

BILL IN EQUITY FOR BREACH OF TRUST.—Rachel Seal, Joshua T. Seal and Edward Grubb, being executors of the will of William Seal deceased, were also trustees under the will of a legacy of $3400 bequeathed to Sarah Sheron. By their testamentary account, passed March 14th, 1823, they credited themselves with the amount of this legacy as so much of the assets held by them as trustees. Four hundred dollars of this legacy was invested in a bond and mortgage of Joseph Bancroft, and was afterward (July 19th 1845,) collected by Joshua T. Seal, as one of the trustees. He never re-invested this sum, but continued to hold it until his death in November, 1856, paying interest on it regularly to Mrs. Sheron. Edward Grubb, one of the trustees, died before Joshua T. Seal collected the money. Rachel Seal survived Joshua and died September 18th, 1857. William Richards, the complainant, was, after the death of all the trustees, appointed a trustee for Mrs. Sheron, and filed this bill, seeking to charge the estate of Joshua T. Seal *and also the estate of Rachel Seal*, with the trust fund of $400, with interest from January 1st, 1856, the last date to which it had been paid.

The answer contested the liability of the estate of Rachel Seal, alleging that she was wholly ignorant that Joshua T. Seal had collected the Bancroft bond and mortgage, and submitting that the money having been duly invested she was not bound for the act of her co-trustee in collecting it, in which act she had no participation but, on the contrary, was ignorant of it.

The cause came before the Chancellor at the Feb. T., 1861, and was heard, by consent, upon the bill and answer.

Argument.

D. M. Bates, for the complainant.

It may be conceded, as claimed for the defence, that a trustee is liable only for his own breach of trust, and not for the act of his co-trustee. *Willis on Trustees*, 173, (10 *Law Lib.*) But a breach of trust may consist as well in mere negligence as in active default; and this we charge against Mrs. Seal, that in part through her own neglect of duty the trust fund has been lost. The trust was one for continued investment during the life of Mrs. Sheron, the interest to be paid to her for life. The safety of the investment and due payment of interest was the duty of *all* the trustees equally. When, therefore, Joshua T. Seal collected the Bancroft bond and mortgage it became the duty of *all* the trustees to see to its re-investment. This Mrs. Seal failed to do. From the time of its first investment (Dec. 13th 1843) she gave no further attention to the fund. Her ignorance of the fact that Joshua T. Seal had called it in affords no excuse; for the fact appeared by his satisfaction of the record, and she could have known, and as co-trustee was bound to know the condition of the fund. Ignorance of the act or default of a co-trustee is held not to be an excuse where such ignorance results from neglect. *Willis on Trustees*, 196: (10 *Law Lib.*;) 2 *Sto. Eq. Jur. sec.* 1283, 1275; *Hill on Trustees* 310; 8 *Price Exch. Rep.* 127; 7 *Gill & Johns* 167.

T. F. Bayard, for the defendants.

Co-trustees are not liable for the acts of each other unless they are participants in the breach of trust, or on the ground of consent to fraud. The mere ignorance of Mrs. Seal as to the misconduct of Joshua does not charge her. Actual or tacit connivance must appear to charge a co-trustee. *Hill on Trustees* 443, *Am. notes*: 3 *Lead. Cas. in Eq. part II, pp* 468, 9—470, 1; *Sto. Eq. Jur. sec.* 1280, 1, 2,

Statement of the case.

3. It is not pretended that Mrs. Seal knew that Joshua had collected this investment. She was a non-acting trustee; and, having seen the fund originally properly invested, she cannot be charged for the act of a co-trustee in disturbing the investment without proof of co-operation or connivance. Besides, the collection of the Bancroft mortgage and satisfaction of the record by Joshua T. Seal *alone* did not discharge the mortgage. He could not have sued for the money without his co-trustee, and therefore could not alone discharge the mortgage.

THE CHANCELLOR, after holding the case under advisement, considered that the ignorance of Mrs. Seal was no defence, it being the result of her negligence, which of itself was a breach of trust, and that she was chargeable with a loss which her diligence might have prevented. He, therefore, granted a decree charging her estate, as well as Joshua T. Seal's, with the trust fund and its interest.

THE STATE OF DELAWARE,

vs.

GEORGE P. EDDY.

New Castle, April, 1861.

Breach of an injunction against the further drawing of a lottery punished, under the circumstances, by imprisonment two weeks and until the drawings should cease.

ATTACHMENT FOR BREACH OF AN INJUNCTION.—The defendant, one of the firm of Wood, Eddy & Co., who claimed to draw a lottery under authority of a certain act of the

General Assembly, was attached for breach of an injunction issued on the 5th of April, 1861, restraining Wood, Eddy & Co. from the further drawing of lotteries under said act. Upon the examination of the defendant under interrogatories it appeared that the injunction was first served upon him on the evening of the 5th of April by the officer reading to him the beginning of the writ and the conclusion or mandatory part; that he took the writ, examined and read a portion of it, but without being served with a copy. On the next morning (April 6th) the sheriff's officer served the defendant with a copy of the writ, but without then shewing the original. The lotteries continued to be drawn in Wilmington, as before, until April 8th inclusive, after which the drawings were made at Covington, in Kentucky, for the purpose of deciding schemes devised under the Delaware State lottery. The defendant, as stated in his examination, was the only member of the firm resident in Wilmington. His counsel was absent from the city at the service of the injunction and did not return until the next afternoon. Under these circumstances the defendant did not stop the drawings. He disclaimed all intention to commit a contempt of court.

On the 15th of April, 1861, the defendant was brought before the Chancellor, and being examined under interrogatories,

G. B. Rodney and *N. B. Smithers*, moved for his discharge.

They insisted that there had been no sufficient service of the writ; that the first service was defective because no copy was left; and the second also, because then the original was not exhibited. *Blake's Chan. Prac.* 402.

Supposing the service to be sufficient, it was admitted that there had been a technical contempt; but it was

Argument for the State.

wholly without design, and greatly mitigated by the peculiar circumstances. The defendant was the youngest member of the firm and alone; his partners absent; his counsel also absent. They had a large business, with subcontracts to be affected by suddenly stopping the drawings. It might involve large forfeitures for the violation of contracts already made—and depending on the drawings. Under these embarrassments and being without counsel he only did not interfere to stop the drawings. Contempts must be intentional and the defendant may therefore well be discharged. But, at all events, the punishment should be light, being measured not with a view to deter others but according to the deserts of the party under the circumstances.

D. M. Bates (representing the Attorney General) for the State.

The service of the writ, taking all that was done by the officer, was ample. The original writ was exhibited and was examined by the defendant on April 5th; a copy was delivered the next morning. The service was thereby complete. The case, then, presents these points:

1. *The duty of the defendant.*—It was to stop the drawing, instantly and every where. Want of counsel was no excuse. The writ spoke for itself and was intelligible. Nor is it enough to say that he did nothing. He was bound to interfere. The acts of his agents were his acts. Their drawing was his drawing.

2. *The breach of duty.*—It commenced with his permitting the drawing on the evening of the 5th of April, and has continued ever since. The drawings in Kentucky are equally a breach of the injunction, which forbade the drawing of any lottery under color of the law of this State. As to the drawings in Kentucky he was not passive. He

Opinion.

made arrangements for them, and set the wheel in motion there, so as to evade the injunction.

3. *The measure of punishment.*—The question is not one of motive but of public policy The contempt which is punishable is not disrespect to the judge or tribunal; but it is the willful disobedience to judicial process; and the present is a most flagrant instance of it. The punishment should be such as will effectually prevent a recurrence of such contempts, and secure prompt obedience to the process of the court; and with this view should be by imprisonment as well as fine. Such parties can well afford to pay money—only imprisonment will effectually deter them.

In this case the contempt continues, since it does not appear that the drawings in Kentucky have ceased. The order should, therefore, be such as to enforce obedience by committing the defendant until the drawings cease every where.

HARRINGTON, CHANCELLOR.—I have no difficulty in deciding that the defendant has been guilty of a contempt; but rather how to adjust the punishment. The contempt is admitted by the defendant in his frank reply to the interrogatories. I am, therefore, embarrassed only by the extent of the order I shall make, which must treat the defendant as a voluntary and deliberate contemner of the process of the Court, and yet also as one who has promptly surrendered himself to its jurisdiction, frankly and fully answered its interrogatories and sought to excuse, without denying, the contempt. The order, with all just consideration for these mitigating circumstances, must still be such as to vindicate the authority of this Court and ensure obedience to its process.

The Court orders the imprisonment of the defendant for two weeks and until he shall thereafter satisfy the Court hat he obeys the injunction.

Statement of the case.

JACOB HILL,

vs.

BENJAMIN GARMAN and wife, and ABRAHAM CANNON, sheriff.

New Castle, Sept. T., 1861.

An ante-nuptial contract, not recorded, raises no equity, at the suit of a debtor to the wife *dum sola*, to restrain the collection of the debt at law by process in the name of the husband and wife.

Such a debtor has no interest in the contract, entitling him to set it up in equity.

Nor is the debtor at any risk in paying the debt. Such payment would protect him against any future claim by the trustee under the contract, who had not interfered to prevent the collection of the debt by the husband.

BILL FOR INJUNCTION AGAINST A JUDGMENT.—The defendant, Benjamin Garman, in 1856, married Experience Lore, a widow. At the time of the marriage she held the bond of the complainant for $1000. The bill alleged an ante-nuptial contract between Garman and wife vesting her property in Joseph Donoho, as a trustee for Mrs. Garman, and judgment having been entered on the complainant's bond and execution issued for its collection in the name of Garman and wife, this bill was filed praying an injunction.

The answer denied that there was any marriage contract. It admitted that prior to the marriage a memorandum was made giving to the intended wife the power thereafter to make a trustee of her property for her separate use; but the answer denied that any thing was done in execution of it, alleging that after the marriage the defendant destroyed the paper, with Mrs. Garman's consent, because she con-

sidered herself competent to manage her property without a trustee.

Depositions were taken for the complainant, tending to prove the execution of a paper for the purpose of a marriage contract and appointing Donoho as a trustee; also that it had been destroyed. The evidence on this point is stated and considered in the opinion of the Chancellor.

The cause came before the Chancellor, at the Sept. T., 1861, for a hearing upon the bill, answer and depositions.

G. B. Rodney, for the complainant.

The execution and destruction of a paper, ante-nuptial in its character, is fully proved. Its contents and effect are also proved by two witnesses, sufficient to overcome the denial of the answer. The proof shows that the paper took present effect as a marriage contract and changed the property in the bond. Were the proof even doubtful, the maxim would apply; "*omnia præsumuntur in odium spoliatoris.*" 2 *P. Wms.* 748; *Hob. Rep.* 108. The result is that Garman has no title to recover this debt, and the complainant, were it collected from him, might be called on again to pay it, either now by the trustee or by Mrs. Garman should she survive her husband. Hence, his equity to be relieved here.

J. R. Booth, for the defendant.

There is no proof of the *delivery* of the paper alleged to be a marriage contract. A delivery must be such as a party cannot recall. This paper was not delivered to Donoho, but given back to Garman. With respect to its *contents*, the allegation of its being a present marriage contract is denied by answer, and is not sufficiently proved. But at all events, there is no proof of the *accept-*

ance of the trust, such as to exclude the husband's marital rights. 1 *Sto. Eq. Jur. sec.* 533; *Lewen on Trusts*, 228. No attempt was ever made by Donoho to exercise the rights of a trustee. On the contrary, though he knew of a sale of some property by Garman and wife, he did not interfere with it.

Conceding a marriage contract to have been executed, the complainant has no interest in it, not being a party nor a privy. He is a mere stranger or volunteer, having no right to set it up in equity. 2 *Sto. Eq. Jur. sec.* 793, 875.; *Lewen on Trusts*, 295. He owes the money and is bound to pay it to the legal holder of the bond. The ground of equity alleged, viz: that he may be called on to pay it again, has no foundation. The trustee may be in danger from permitting the husband to collect the debt; but if the trustee does not interfere the debtor is at no risk, unless in a case of fraudulent collusion with the husband.

Were the complainant entitled to proceed in equity, on the ground of a trust, the bill is defective in not making the trustee a party.

HARRINGTON, CHANCELLOR.—The bill is filed by Hill, a judgment debtor, under execution at the suit of Garman, the husband of Experience Lore, on a bond given by complainant to her *dum sola*. It alleges, as a ground for restraining the collection of the debt, that by an ante-nuptial contract the right to this and all Mrs. Lore's property was vested in Donoho, as her trustee. The defendant contends that, even if this is true, the debtor has no right to relief, he being no party or privy to the ante-nuptial contract, nor interested in its specific performance so as to entitle him to ask for such relief. It is also objected that the trustee is no party to the suit; and, further, it is insisted that there is no sufficient proof of the execution and delivery of such a contract before Garman's marriage with Mrs. Lore. These are the material points of the case.

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In regard to the execution of an ante-nuptial contract and its object, I am satisfied, on the proof, that such a contract was made, and for the purpose stated in the depositions and implied even in the answer, viz: to preserve the control of the property to the parties respectively after marriage, as it was before. The bill alleges the execution of a paper appointing a trustee for the wife and vesting her property in him for that purpose. The answer denies not the execution of a paper on the eve of the marriage, but suggests that its purpose was not to appoint a trustee but to provide that the wife might, after marriage, appoint such a a trustee, if she pleased. This is not probable, nor would it be possible in this form; for, though an unmarried woman might, before marriage, divest her property by conveying it to a trustee, and even retain the power of cancelling this after marriage, she could not, by a mere agreement, conveying nothing to a trustee, retain the power, after marriage, of making such a trustee at pleasure. Nor is it possible that the parties should meet a notary at the house of the intended trustee and procure his consent and acceptance of the trust and the formal execution of a paper as a mere memorandum that the woman retained the right, after marriage, to appoint him the trustee, if she pleased. And the reason assigned in the answer for destroying the paper, viz: that Mrs. Garman thought herself competent to manage her own property without the aid of a trustee, implies that such a trustee was appointed by that paper, with such power. And this is proved in the depositions of Gibbs and Donoho, which are sufficient, with the corroborating circumstances, to establish to my satisfaction the allegation of an ante-nuptial settlement, as stated by the complainant.

But the question remains whether this is sufficient for the complainant's case? It does not show any interest he has in the property sought to be preserved or protected by

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this agreement, nor any right he has to ask for its specific performance under a decree of this Court. The alleged ante-nuptial agreement was made to preserve Mrs. Lore's right of property, by placing it under the protection of her trustee, Donoho. It was a private arrangement, designed to be private, in order to effect a purpose in which Mrs. Lore only was interested; and the agreement never having been put on record there was no notice of it which could injuriously affect third persons. With respect to a contract, thus private in its origin, private in its object, not made known in any public form, surrendered in its very origin to the custody of the husband and by him destroyed, a debtor to the wife *dum sola* would be in no danger, either in a court of law or equity, from paying his debt to the husband on a judgment recovered by him as husband.

It is upon this ground only, as I can perceive, that the complainant comes into this Court to enjoin the collection of a debt, confessedly due from him to Mrs. Lore, by Mr. Garman, her husband, on a judgment confessed to him as her husband. And to hold that every debtor of the wife is excused from paying his debt to the husband, because there is a private ante-nuptial agreement between the husband and wife, would be to rule that all debtors are bound to take notice of a transaction between other persons of which they have, and could have, no knowledge.

Preserving to the parties to these private agreements full power to enforce them so as to secure all their objects, it is better to leave third persons to their legal responsibilities, which, in such a case, give the husband a right to sue for his wife's *chose in action* and to recover it, unless the parties interested in this private arrangement, designed to change the course of the law, shall procure the establishment of that arrangement in such mode as will bind third persons.

Being of opinion that Mr. Hill's payment of this judg-

Statement of the case.

ment would protect him against any claim by Mrs. Garman's trustee, I think the equity set up by his bill has failed; and I must, therefore, decree that the injunction heretofore ordered be dissolved, and that the bill be dismissed with costs.

ADOLPHUS P. EWING,

vs.

GEORGE B. CHASE, administrator of JAMES S. CHASE, deceased.

Sussex, Sept. T. 1861.

Injunction granted to restrain the collection of a promissory note, the consideration of which had failed.

Agreement to sell a stage line and the right, under a sub-contract with the Government contractor, to carry the mails for an unexpired term of one year and nine months. The vendee, after running the stage line and carrying the mails six months, was deprived by the Government contractor of the mails. Soon afterward, the vendor was again employed to carry the mails and carried them for the residue of the term. *Held*, a failure of consideration, to the value of the mail privilege, of a note given for the purchase.

A defence founded upon the alleged default of the vendee in the carriage of the mails is sustainable only by action of the Government, forfeiting the contract.

BILL TO BE RELIEVED FROM A PROMISSORY NOTE FOR FAILURE OF CONSIDERATION.—This bill alleged that James S. Chase, on the 4th of September, 1854, being engaged in carrying passengers by a stage route from Milford to Georgetown, and also the United States mails on said route, represented

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to the complainant that he held the contract and privilege of carrying said mails, with power to assign the same and the profit incident thereto, for the period of one year and nine months from the 1st day of October, 1854; and that Chase offered to sell to the complainant said stage line and mail contract for $800.00; that the complainant, confiding in the representations of Chase, accepted his offer, and thereupon an agreement in writing was made and signed by Chase as follows, viz:

"I agree to sell out my mail line from Milford to Georgetown, with six horses, one large stage, three hacks and six set of harness, to Adolphus P. Ewing, on the 1st day of October, 1854—all the articles to be in as good order as they are at this time—for the sum of eight hundred dollars on the delivery of the above-named articles. Sept. 4th, 1854.

(Signed) JAMES S. CHASE.

Attest, JAMES P. BARKER.

The bill alleged that, pursuant to the agreement, and as the consideration therefor, the complainant, on receiving the stock therein mentioned, gave to Chase two judgment notes, dated Sept. 30th, 1854, each for $400; that the complainant, on the 1st of October, 1854, commenced running the said stage line and carrying the mails thereon, and for the period of six months continued to carry said mails, performing such duty faithfully and without any complaint on the part of the Postoffice Department; that he then discovered that Chase had held no contract with the United States Government for the carrying of said mails,and had no assignable interest in such contract; but had only been hired to carry said mails by one John Vangesel, who held the contract with the Government; that the complainant, after six months' carrying of said mails, was discharged by the contractor, Vangesel, without any default on his part; that Vangesel himself then

carried the mails for a few weeks, after which Chase was again employed by Vangesel to carry the mails, and continued to carry the same, together with passengers, over said route until the expiration of the before-mentioned term of one year and nine months.

The bill alleged that although Chase had, as an inducement to the purchase of the stage line and mail privilege, assured the complainant that he would receive $150 per quarter for carrying the mails, the complainant had not in fact received anything; that Chase had continued, after the sale of the stage line and mail privilege, to collect from the contractor, Vangesel, the stipulated compensation therefor, the right to the same not having been legally assigned to the complainant. The bill alleged that the complainant had paid to Chase one of the said judgment notes, with interest, which was a sufficient satisfaction for the stock which the complainant had received; that with respect to the other judgment note, for $400, there had been, through the fraudulent conduct of Chase, a total failure of consideration; but that, nevertheless, Chase in his lifetime had taken legal process for the collection of the same, which process was after his death continued by his administrator, the defendant. *Prayer* for an injunction.

The answer of the defendant, who was the administrator of James S. Chase, denied that before or at the time of the sale of the said stage line and mail privilege, James S. Chase had represented to the complainant that he held a contract with the United States Government for carrying the mails, or that he had power to assign the same; or that he had made any representations other than what appeared on the face of the written agreement. It also denied that the complainant had carried said mails without default, but on the contrary alleged that he had been negligent. The answer alleged that under the agree-

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ment the complainant was only intended to be placed in the same relation to Vangesel which Chase had held; that he became entitled to receive for the carrying of said mails such compensation as the said Chase had been entitled to, but whether he had received the same the defendant did not know. The answer charged that, at the time of the sale of said mail privilege, it was notorious that Vangesel held the contract for carrying the mails and that Chase was employed under him; that the complainant must have known these facts; that he entered into the arrangement, taking the chance of his continuing to be employed by Vangesel and without any assurance or guaranty from Chase of said continued employment; and that he was discharged by Vangesel in consequence of his defaults in the said service and not through any fraudulent representations of Chase. The answer insisted that the stock assigned to the complainant, together with the privilege of carrying the mails as the said Chase had done and subject to the same risk of being discharged, formed the consideration for the two judgment notes, and that no part of such consideration had failed.

Depositions were taken on both sides. The weight of the testimony went to shew that Chase at the making of the agreement represented, or led the complainant to understand, that he held and could assign the right to carry the mails between Milford and Georgetown. The evidence with respect to the complainant's punctuality in carrying and delivering the mails was conflicting, but the weight of the testimony was favorable to the complainant. It was proved that the complainant run the line for about six months, was then turned off by Vangesel, the U. S. contractor—for what cause was not explained in the testimony—that Vangesel run the line for a short time, when Chase took it again and held it for the unexpired term of Vangesel's contract with the Government. It was further

proved that the horses sold to the complainant were old and the stock in poor condition, in all worth about $400.

The cause came before the Chancellor, at the Sept. T. 1861, for argument upon the bill, answer, exhibits and depositions.

Jacob Moore and *W. Saulsbury*, for the complainant.

The written agreement by Chase was for the sale of his "mail line from Milford to Georgetown," which can only be taken to mean a *right*, by sub-contract with Vangesel, to carry the mail. Supporting this construction are his representations, proved by two witnesses, that he had this right and could sell it. It turned out that he had not the right; and consequently Ewing was turned off, and, as is proved by the best testimony, that of the postmasters on the route, without any default of his own. Then Chase gets himself in again. It is a clear case of fraud and failure of consideration for the note now unpaid. The complainant has paid one of the notes for $400, which is equal to the proved value of the stock. The note now in question represents no more than the value of the mail privilege, of which the complainant was deprived.

C. S. Layton and *A. P. Robinson*, for the defendant.

The written contract speaks for itself. It does not in terms cover a mail contract, but puts the complainant in the relation Chase had held to the Government contractor. They all knew that Vangesel held the contract, and the complainant dealt with Chase as a sub-contractor, taking such rights as he had. There was no undertaking to insure the continuance of the privilege; and Chase's representations meant no more than that he could put the complainant in his place.

HARRINGTON, CHANCELLOR.—The pleadings and evidence

Opinion.

in this case satisfy me that James S. Chase, being the alienee, assignee, or sub-contractor of John Vangesel in a mail contract with the U. S. Government and the owner of stock on the road between Georgetown and Milford, and actually running the line and carrying the mails at a certain price, sold the stock and the mail contract to Chase for $800, the stock being worth about half that sum and the privilege of carrying the mails the other half. Supposing him to have had the sub-contract, the sale of it to Ewing did not bind him to guarantee its continuance against government forfeitures; nor did it give Ewing any privity of contract with the Government or with Vangesel; but it did oblige the vendor to let Ewing have what he proposed to sell, and thereafter to do nothing on his part to take it away from Ewing. Simple justice requires the former; a violation of the latter would be a fraud.

The line, with the mails and the stock, were delivered to Ewing and he commenced running it, and for several months continued to run it, according to the weight of evidence, with punctuality, when the mails were taken from him by Vangesel, and soon after Chase himself again run it. Collusion between Vangesel and Chase is charged but not proved. But, is such collusion necessary to make this result a violation of Chase's contract? Taken either way, it is a breach of contract on his part. If he had no right under Vangesel, such as could not be taken from him without cause, he fraudulently sold such a right. If it was forfeited by the neglect of Ewing, such neglect should be shown affirmatively; and it could not be shown otherwise than by the action of the Government forfeiting it. The case assumes that Chase sold an interest in Vangesel's contract with the Government, co-extensive in time with the contract; at least, he assumed to sell such a right and took complainant's notes for it, together with the stock. Being found within that time in the exercise himself of the same right he had sold, and which had not

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been forfeited by Government, he has no equitable claim on the balance of the consideration which was to have been paid for the right. The evidence shows that the complainant availed himself of it for about six months, and for that proportion of the time Chase would be entitled to a like proportion of the sum promised, but the complainant would have a right of action against Chase's administrator for an equal amount of mail money; and, to avoid circuity of action, I think it is competent for this Court now to settle both claims by a decree reaching the whole equity of the case.

Being, therefore, of opinion that the consideration for which one of these notes was given has failed, I think the complainant is entitled in equity to be relieved from the payment of it, on the ground taken in the bill; and I must, therefore, decree a perpetual injunction, with costs.

NATHAN J. BARWICK, administrator d. b. n. of JOHN C. BARWICK, deceased,

vs.

SOPHIA E. WHITE, administratrix of GEORGE P. WHITE, deceased, and WILLIAM CANNON.

Sussex, Sept. T. 1861.

A trust fund, so long as it can be traced, may be followed for the purpose of enforcing the trust.

A promissory note, taken by an administrator for proceeds of land of his decedent sold under an order of the Orphans Court for the payment of debts, and shewing on its face the purpose for which it was given is a trust fund.

Statement of the case.

Upon the death of the administrator, the assignment of the note by his administratrix to pay his debts is a breach of trust and a legal fraud, for which the administratrix and her assignee are liable in equity.

The maker of the note. by whom it had been paid, is not a necessary party to a bill to enforce the trust. Neither are the heirs or devisees of the decedent, whose land was sold, necessary parties. The fund belongs to the administrator *de bonis non* of the decedent.

BILL IN EQUITY.—George P. White, as administrator of John C. Barwick, deceased, under an order of the Orphans Court made at the March Term, 1857, sold the land of the decedent for the payment of his debts. The sale was made to Simeon J. Pennewill for $291.88, of which sum Pennewill paid part in cash, and for the residue, $140.28, gave his promissory note, payable to George P. White or order, in these words:

"BRIDGEVILLE, March 9, 1857.

On demand, I promise to pay to George P. White or order, one hundred and forty dollars and twenty-eight cents, being for the balance of the sale of the lands of John C. Barwick, sold by order of the Orphans Court and purchased by me."

(Signed) SIMEON J. PENNEWILL.

After White's death the note, being unpaid, was indorsed by his administratrix, Sophia E. White, to William Cannon, a creditor of White, to whom it was paid by Pennewill. This bill was filed by the complainant, as admintrator d. b. n. of Barwick, claiming that the note was a trust fund in the hands of White, as administrator of Barwick; that its assignment to Cannon was a breach of trust and a legal fraud on Barwick's estate. The bill alleged a demand on Cannon before the collection of the note; and it prayed a decree that the defendants pay the amount collected on the note, with interest.

The answer of the defendants alleged that, at the time

Argument for complainant.

when White sold the land of Barwick and took Pennewill's note for the proceeds, Barwick's estate was indebted to him in $122.22, for that amount overpaid by him as administrator; that there was also due to him $40.97 for commissions allowed by the Orphans Court upon the sale; that he had also paid $10 for the expense of repairing the fence on Barwick's land; that these sums amounted to more than the note, and that White was entitled to hold the note and its proceeds against them. The answer took the further defence that the proceeds of sale were not a trust fund, inasmuch as White, the administrator, had given security in the Orphans Court for the due application of the proceeds; that the complainant's remedy, if any, was against the surety by suit at law on the bond of the administrator and not in a court of equity. The answer also insisted that the bill was defective for the want of proper parties, in not joining the heirs at law and devisees of Barwick; also, in not joining Pennewill, as the maker of the note in question.

It appeared, by exhibits proved at the hearing, that the amount due White, the administrator, as alleged in the answer, had been reduced by sundry payments, made by Barwick's widow, to $44.00.

The cause came before the Chancellor, at the Sept. T. 1861, for a hearing upon the bill, answer and exhibits.

A. P. Robinson, for the complainant.

The note for $140.28, being for purchase money of Barwick's land, and taken by White in the character of administrator, whether so named in it or not, was a trust-fund in his hands, and came to his administratrix, Sophia White, and afterward to Cannon, subject to the same trust. On White's death the note passed not to his administratrix, but to the administrator *de bonis non* of Barwick, to whom the money belonged as the fruit of Bar-

Argument for defendants.

wick's estate. A note made for a special purpose to an administrator does not go to his representative, but to the administrator *de bonis non.* The result is that the appropriation of the note to pay White's debt to Cannon was a breach of trust and a legal fraud on Barwick's estate. 1 *Barn & Cress*, 150; 4 *Adolph & Ell.* 870; 10 *Ib.* 784; 2 *M. & S.* 562; 12 *Ves. Jr.* 119. The fact that White's bond, as administrator, may be sued at law against the surety does not deprive us of our remedy against Mrs. White and Cannon, for the breach of trust and fraud. These are subjects peculiarly of equitable cognizance, which is not affected by the existence of a remedy at law against other parties.

The defence that Barwick's estate owed White more than the amount of the note is answered by the proof. The widow had re-imbursed the balance overpaid by White as administrator; or, at least, had left only a small balance due him.

J. Moore and *W. Saulsbury*, for the defendants.

The proceeds of sale of the land were assets in the hands of White, the administrator, which he had a right to receive in any form. By taking the note in his individual name he made it his own. His return of sale charged him with the whole proceeds, for which he and his surety became liable on his bond. This afforded an adequate remedy and the only remedy. Barwick's administrator *de bonis non* is not entitled to administer the proceeds of land sold by White. If not necessary for the payment of debts they belonged to the heir or devisee, who alone could sue for them. They are not parties to the bill.

If *fraud* be relied on as the ground of relief, it could be only fraud against the surety in the bond, who alone is affected by it; and he is not the party complainant.

HARRINGTON, CHANCELLOR.—George P. White, as the

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administrator of John C. Barwick, sold his land by order of the Orphans Court for payment of debts, giving the usual bond and surety for the application of the proceeds. The sale was made to Simeon J. Pennewill for $291.88,part of which was paid in cash and a note given for the balance, $140.28, payable to George P. White, or order, the same being part of the proceeds of sale of Barwick's land. This note was assigned,after White's death, to William Cannon, and by him collected of Pennewill.

The bill is filed by an administrator *de bonis non* of Barwick, claiming this note as a trust fund in the hands of White's administratrix, or her assignee Cannon, stating a demand on him before collection. It proceeds on the ground of a breach of trust by Mrs. White, and of legal fraud by both her and Cannon,in diverting to the payment of White's debts a fund which on its face belonged to Barwick's estate.

The answer denies that the complainant, as the representative of Barwick's estate, has any standing in a court of equity against White's representative, as there is a clear legal remedy on White's bond; and it denies that he has a remedy any where for the proceeds of sale of land where such land was sold by another. It denies also that any investigation can be made as to the fraud in converting the note to an improper purpose, without making Pennewill a party.

As long as the proceeds of trust property can be traced, as separate from other property of the trustee,it is liable to the trust purposes. George P. White, as administrator of Barwick, had no right to the land, or its proceeds, until that land had been lawfully sold under the order of the Court; and the proceeds came to his hands for the purpose for which it was sold,viz: the payment of Barwick's debts. While, therefore, the proceeds of sale of this land were represented by the note of the purchaser, expressing on its face that it was trust property, it remained trust property,

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and belonged to the estate of Barwick in the hands of his administrator, White, as a trustee for Barwick's creditors, and, after they were paid, as trustee for his devisee or heirs at law. In that condition was this fund at the death of George P. White, who had received more than enough money from the sale of the land to pay the balance appearing due to him on his second administration account after deducting the payments made by Mrs. Barwick for sinking this balance. Indeed, from the proof in this cause of such payments, there was but $44 overpaid by him at the time he got the order to sell Barwick's land. George P. White, therefore, had no claim, personally, to the proceeds of sale beyond this, and he was a trustee for the balance; and these proceeds, embraced in this note, are traceable and distinguishable. It was not in the power of his representative, Mrs. White, nor of Mr. Cannon, her agent or assignee, to change the character of this fund or bring it into White's estate. It was a trust fund and belonged to other parties. The attempt to change it to a personal fund, belonging to White and falling into his estate, is inequitable toward those who have the right to the fund or to its application, and is such a fraud (in a legal sense) as this Court will prevent or redress.

To the proper exercise of this jurisdiction it is not necessary that the heirs or devisees of Barwick, or that Pennewill, should be made parties. The fund in its present state belongs to the personal representative of Barwick, applicable to debts, if there be any, and only to heirs or devisees after these are satisfied. There was no necessity for making Pennewill a party; for he has paid the note and no decree is sought against him.

I am, therefore, of opinion that the complainant is entitled to a decree for the payment of $140.28, the amount of the note and interest, with costs.

Decree accordingly.

Statement of the case.

WILLIAM HORSEY,

vs.

BENJAMIN STOCKLEY, AND JOHN O. HORSEY.

JOHN O. HORSEY,

vs.

BENJAMIN STOCKLEY.

Sussex, Sept. T. 1861.

B. S. held an indemnity against his indorsement of two notes of J. O. H. The notes were paid in part by money loaned to J. O. H. by W. B. H. at the request of B. S. and on his guaranty of re-payment by J. O. H. W. B. H. took for the loan the due bill of J. O. H. payable in ten days. There was no agreement by J. O. H. that the indemnity held by B. S against his indorsements should stand as a security for the loan by W. B. H. *Held*, upon the failure of J. O. H. that W. B. H. was not entitled in equity to the benefit of the indemnity to B. S. *Held, also*, that B. S. while liable under his guaranty to W. B. H. was protected by the indemnity, it being given in terms against "any loss, injury or damage that might accrue to him, on account or by reason of his indorsement."

In the particular case, B. S. having been discharged from liability under the guaranty, and the notes indorsed by him being paid, proceedings to enforce the indemnity were enjoined.

These cases grew out of the same state of facts and were heard together. The circumstances were as follows. Benjamin Stockley, having indorsed two promissory notes, of $1000 each, for John O. Horsey, took from him a judgment note for $1500, as a security or indemnity against "any loss

Statement of the case.

or damage that might accrue to him on account or by reason of said indorsement" of the notes, both of which were then unpaid. Both the notes were afterward paid by John O. Horsey, as he alleges by his answer in the one case and his bill in the other, *out of his own funds*; but the bill of William B. Horsey in the first case, and the answers of Stockley in both cases, allege that of the money applied to the notes the sum of $650 was paid with money *which Stockley advanced through William B. Horsey* as a loan to John O. Horsey. William B. Horsey did in fact loan the money ($650) to John, and took his due bill for it, payable to himself in ten days. He alleges in his bill that it was lent with the understanding of all parties that it was to be applied to one of the $1000 notes for which Stockley was then liable as indorser and was indemnified. He further alleges that in a settlement with Stockley he had charged himself with the $650; and he claims by this bill the benefit of a judgment which had been entered on the indemnity note to Stockley, as an equity belonging to him, to enable him to secure the re-payment of the money by John O. Horsey. On the other hand, John O. Horsey, by his answer in the one case and his bill in the other, alleges that he borrowed the $650 of William B. Horsey on the security of his own due bill, without any agency or responsibility of Stockley; and by his bill he prays an injunction against an execution issued upon Stockley's judgment on the indemnity note.

A considerable body of testimony was taken, on both sides, touching the circumstances under which the $650 was loaned to John O. Horsey and Benjamin Stockley's connection with it. The material facts proved are stated in the opinion of the Chancellor.

The two cases came before the Chancellor, at the Sept. T. 1861, for hearing upon the bills, answers, exhibits and depositions.

C. S. Layton, for Wm. B. Horsey.

Argument—opinion.

The $650 was advanced to John O. Horsey expressly to take up the $1000 note, which was protected by the indemnity to Stockley. It was done at Stockley's request and with the knowledge and consent of John O. Horsey. William B. Horsey is, therefore, in equity, entitled to the protection of the indemnity held by Stockley against a liability from which, at his request, he has been relieved by William B. Horsey's loan.

J. Moore and *W. Saulsbury*, for John O. Horsey.

The proof is that William B. Horsey loaned the $650 to John O. Horsey on the security of John's due bill, Stockley guaranteeing the re-payment of the money. But, there was no agreement by John that the indemnity note should stand open as a security for this loan; and, without such agreement, the indemnity note was discharged by the payment of the two indorsed notes for $1000 against which only the indemnity was given. It matters not with what money the indorsed notes were paid.

HARRINGTON, CHANCELLOR.—These cases, which have been heard together, are so blended as necessarily to run into each other in the consideration of them. It appears that Benjamin Stockley, having indorsed two notes, of $1000 each, for John O. Horsey, took from him a judgment note for $1500, the amount of his liability, as a security or indemnity against "any loss, injury or damage that might accrue to him on account or by reason of the indorsement of said notes," both of which were then unpaid. Both the notes were afterward paid by John O. Horsey, as he alleges, out of his own funds, the last one soon after it was protested; but the answer of Stockley, and also the bill of William B. Horsey, alleges that $650 of it was paid with money which Stockley advanced through William B. Horsey, on a loan to John. To secure this payment Stock-

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ley entered judgment on the indemnity note and issued an execution for $650. John O. Horsey's bill is filed for an injunction against this execution. William B. Horsey, at the time the $650 was advanced to John, took his due bill for it, payable to himself in ten days; and, as he alleges, it was lent, with the knowledge of all parties, to pay the $1000 note for which Stockley was bound as indorser, and against which he was indemnified as aforesaid. William B. Horsey claims the benefit of this indemnity, as an equity belonging to him, to secure its re-payment by John O. Horsey, he having charged himself with it in a settlement with Stockley. He files his bill for that purpose.

John O. Horsey in his answer to William's bill says that that he borrowed this sum ($650) of William on the security of his own due bill, without any responsibility or agency of Stockley; and he asserts that William demanded the money from him more than two weeks after the due bill is now said to have been transferred to Stockley.

Looking beyond these bills and answers, the testimony of Nathaniel Horsey is, that all three of these parties told him the note was paid with money borrowed by John of William B. Horsey on a due bill. Benjamin Stockley, who was examined as a witness in the case of William B. Horsey vs. John O. Horsey, deposes that after the note was protested he prevailed on William to offer the money ($650) on loan to John, in order to pay off the note, he becoming responsible for its re-payment, and that he has re-paid it to William. He further states, that in a settlement made between them on the 8th of August 1859 this sum of $650 was included as a charge against William B. Horsey, and has since been fully settled by him. Alfred P. Robinson, Esq., confirms this. The account shows the same thing, having an entry as a debit against William B. Horsey in these words; " amount of my liabilities on transfer of John O. Horsey's due bill, dated 8th of April 1859,

and payable April 18th 1859, for $650." Nathaniel Horsey also says that William B. Horsey told him that he had loaned the money to John on a due bill, which had not been paid but was included in the settlement with Stockley and paid to him by Horsey. All this would be inexplicable but for the fact of John O. Horsey's failure and Stockley's holding an indemnity under which the parties were seeking shelter.

The point of these cases is whether either, and which of them, can equitably avail himself of this security to collect the debt of John O. Horsey, and thereby secure a preference over his other creditors.

To my mind it is clear enough that a part of the $1000 note indorsed by Stockley, and against which he held an indemnity, was paid with money borrowed for that purpose of William B. Horsey on John O. Horsey's due bill; and that the money was so lent with the knowledge and at the instance of Stockley, and on his guaranty—the assent of John O. Horsey to its being thus brought under the indemnity security not being expressed. But, with or without his assent, Stockley's equity is clear to avail himself of that security so long as he remained liable for the sum thus paid on account of his indorsement; and the more so after he had paid to William B. Horsey the sum borrowed of him to take up the note, if he ever did pay it. But, I cannot perceive what equity William B. Horsey has to fall back on Stockley's indemnity for money which he lent to John on a legal security, both as to principal debtor and guarantor, if there was a guaranty. To that security he must look for his remedy; and, though the money advanced by him may have been applied so as to relieve another person who had an indemnity, this gives him no right of subrogation, which seems to be the idea on which William B. Horsey's bill is founded. Without the express agreement of John O. Horsey to that effect no such right

of substitution exists, if indeed his agreement could have that effect. Such agreement is positively denied by John O. Horsey in his answer ; and it is not proved otherwise. It is not in the case, except by inference from the bill, and a direct charge would not establish it against the denial. Nor can the equity be raised on any idea of suretyship by William B. Horsey for Stockley, since there is no proof, in either of the cases,to establish such a claim. The money was lent by William B. Horsey to John O. Horsey, either wholly on the security of the due bill, in which case there could be no resort by any one to the indemnity, or it was lent to Horsey at the instance of Stockley, upon his guaranty,which would give him a resort to the indemnity in case of loss or liability; and viewing the transaction in this light there was no propriety in assigning the due bill to Stockley by indorsement, which it is alleged was done the day after it was taken, though there is evidence that William B. Horsey held it some time after it was due.

Just in that position I think Benjamin Stockley was entitled to resort to his indemnity, to secure him from loss or damage arising, not directly on the indorsed note but resulting from his indorsement. It was sufficiently covered by the original terms of the indemnity, which was against "any loss, injury or damage that might accrue to him on account or by reason of his indorsements."

But the case shows that this idea was not carried out. The due bill, with the indorsed assignment to Stockley, was still held by William B. Horsey two or three weeks after its date and after Stockley's execution was issued. This is proved by Nathaniel Horsey; and it is proved with equal clearness by him and by Mr. Robinson, and also by a copy of the settlement made between Stockley and William B. Horsey, that the latter was charged with the $650—(on what principle I cannot comprehend) and that he paid it on the judgment and execution which

were the result of that settlement. So that if Benjamin Stockley was at any time responsible to William B. Horsey for this sum, or had through that responsibility an equitable claim, as I think he had, to be indemnified under the collateral security, no such claim now exists, since he has been discharged from liability, and even seems to have been paid the full amount by the man to whom he was responsible. He, therefore, has no claim, legal or equitable, against John O. Horsey; and, though William is still left unpaid by John, he never had any other than a legal security for such payment, which he still possesses, viz: the due bill on which the money was lent. Certainly, the character of his claim cannot be changed so as to give him an equity under Stockley's indemnity bond by his merely charging the due bill against himself in a subsequent settlement with Stockley, though the effect might be to deprive Stockley of a remedy by discharging him of his liability. The money was due to William B. Horsey; and, if he had charged Stockley with it in the settlement, that would have supported the theory of an advance of the money by him to John O. Horsey on Stockley's guaranty—a theory which is well supported in the proof but is inconsistent with both the bills and answers. I, nevertheless, believe that to have been the true state of the transaction. Though stated differently in both the bills and answers it is proved in the depositions of William B. Horsey, Nathaniel Horsey and Stockley himself. Both he and Horsey state that the money was lent under Stockley's guaranty, and they add that it was paid by him. Stockley's deposition on that point is not evidence in his case; and the statement in William B. Horsey's deposition is incidental, if not equivocal, and made as the foundation of his own claim of substitution. The time and manner of payment are not stated, and the contrary may be inferred from the evidence of Nathaniel Horsey. But, admitting it to be true, the evidence is conclusive that Stockley col-

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lected it back from William B. Horsey, and has suffered no loss to entitle him to an indemnity.

The result in the two cases, therefore, is that John O. Horsey is entitled to a perpetual injunction against Stockley's judgment on the indemnity note, Stockley having sustained no injury or loss from his indorsement of the notes; and that William B. Horsey's bill must be dismissed with costs.

Decrees accordingly.

HENRY G. WEBSTER,

vs.

BENJAMIN MCDANIEL and JOHN M. JOHNSON.

New Castle, Feb. T. 1862.

An interpleader will be decreed for the relief of a judgment debtor who has been summoned as a garnishee of the debt under an attachment *fi. fa.* against the judgment creditor.

A debt due under a judgment is subject to attachment.

A judgment debtor, having recovered a judgment in another Court against his creditor, is entitled to relief in equity by a decree for set off.

Though both judgments are legal demands equity will relieve, because they are not judgments recovered in the same Court, so that they could be set off at law under the equitable control of the Court over its own judgments; and there is, therefore, no remedy but in equity.

BILL OF INTERPLEADER.—On the 1st of December, 1860, Benjamin McDaniel recovered a judgment against Henry Webster for $506.83, and on the 3d of January 1861, is-

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sued a *fieri facias*, which was levied to the amount of the judgment. On the 8th of December 1860, Webster was summoned as a garnishee under a *fi. fa.* attachment issued upon a judgment recovered by John M. Johnson against McDaniel before a Justice of the Peace for $78.20. Webster did not answer as garnishee until compelled by an attachment against him, on the 9th of March, 1861, when he answered specially, that he owed McDaniel the aforesaid judgment, which had been executed, and that he was not otherwise indebted to him. On this answer judgment was rendered against him, as garnishee of McDaniel, for the amount of Johnson's judgment, then amounting, with interest and costs, to $134.39. After this, on the 26th of March, 1861, he was compelled to pay to the Sheriff the amount of McDaniel's judgment, which he did under protest. Johnson then issued execution on his judgment against Webster, as garnishee of McDaniel. Thereupon, Webster filed this bill, praying that the money in the Sheriff's hands may be paid into court, and that the parties claiming may interplead, submitting himself as willing that of the fund collected by the Sheriff $134.39 might be applied to either of the judgments of McDaniel and Johnson, as the Chancellor might decree. The bill also alleged that Webster had, on the 13th of March 1861, recovered, before a justice of the Peace, a judgment against McDaniel, amounting, with interest and costs, to $21.34, on which judgment McDaniel had prayed an appeal and given security, but had failed to prosecute his appeal. The bill claimed that this last mentioned judgment was an equitable set off against McDaniel's judgment, and prayed that the amount should be refunded to the complainant out of the money in the Sheriff's hands.

The answer of Johnson claimed the amount of his judgment out of the fund.

The answer of McDaniel claimed the whole of the fund

Argument.

levied from Webster, because even if it was subject to Johnson's attachment Webster was in contempt in not answering until after the levy, and the Sheriff had then become responsible to McDaniel for the amount of his judgment. The answer also insisted that McDaniel's debt, being a judgment, is not subject to attachment; that the debt, having been levied by the Sheriff, was in law paid; that Webster had his remedy against Johnson's judgment by appeal or certiorari, and that McDaniel was not required to interplead concerning it. With respect to Webster's claim to set off his judgment against McDaniel's, the answer insisted that Webster had his remedy for the amount of his judgment against the surety on McDaniel's appeal.

The cause came before the Chancellor, at the Feb. T. 1862, for a hearing upon the bill, answers and exhibits.

D. M. Bates, for the complainant, and also for Johnson.

1. The right to an interpleader clearly arises out of the fact that here are two conflicting claims upon the same subject matter, *i. e.*, part of the money due under McDaniel's judgment, as to the application of which he stands indifferent. 2 *Daniel's Ch. Prac.* (1753.)

2. To which of these claimants does the fund belong? That depends upon the question whether money due by judgment can be attached. It cannot be under the custom of London, upon the somewhat technical ground that the defendant in the judgment has no day in Court, and that to allow the attachment may involve a conflict in the process of the Courts. *Drake on Attach. ch.* 32, *sec.* 638; 2 *Dall. R.* 277. But the policy of our law subjects all a debtor's property to the payment of his debts; and, following this policy, our attachment law is general in its terms, applying to every species of property, rights and credits,

without reference to the form of security by which such rights and credits are held. Judgments with us are treated, not merely as a method of recovering a debt, but as a species of property, largely held; and to except them from attachment would release a large amount of property from its just liability for debts. If, in some cases, such attachments may work inconvenience, it is exceptional and slight, and not to be weighed against the policy of the act.

Our practice has long held judgments to be subject to attachment. *Belcher vs. Grubb*, 4 *Harring. R.* 461, is a direct authority. This case related to a foreign attachment; but whatever is subject to a foreign attachmennt is *a fortiori* subject to an execution attachment.

3. Can Webster set off his judgment against McDaniel's? It is true, these are legal demands, both resting on judgments at law. But relief in equity is claimed on the ground that the opportunity to set off at law is past. A Court of law, were both judgments recovered in the same Court, would set off one against the other, by the equitable control of its process. Where that cannot be done at law, in consequence of the judgments being in different Courts, relief must be had in equity. It is no answer to our claim that Webster might have sued McDaniel's surety in the appeal. Such a defence is an inequitable attempt to fasten his debt upon his surety.

G. B. Rodney, for McDaniel.

I. To sustain a bill of interpleader it is requisite that the complainant hold himself indifferent between the parties—a mere stakeholder, and that he himself claim no interest in the fund. *Whitworth's Eq. Prcc.* 393; (62 *Law Lib.*) Both these conditions are violated in this case. Webster has, in the language of the authority, "mixed

himself up" with the thing, by voluntarily answering to the attachment after the levy under McDaniel's judgment, thus seeking to prefer Johnson. Then, again, he is here claiming an interest, seeking a part of the fund for himself, and attempting to make these parties litigate, in part, for his own benefit. On these grounds the bill is demurrable; but the defence may be taken as well by answer. *Adams' Equity*, 342.

2. We contend that a debt cannot be attached after judgment. The debtor is then liable to execution and should not be harassed by another claimant upon the fund. *Drake on Attachment, sec.* 638. This rule is founded on general principles of convenience and justice, and not merely on the narrow ground of the custom of London. The English decisions do not so base it. 1 *Salk. R.* 280, 292. 4 *T. R.* 312. The rule prevails in this country. It is not to be presumed that our statute on attachments was designed to enlarge the application of the remedy beyond the existing law. Some of its provisions imply the contrary. Under our attachment law the garnishee is to be "allowed to the extent of his answer." How is a judgment debtor to be so allowed? He has no opportunity to plead his answer. This provision plainly contemplates as the subject of attachment, simple contract debts, against which the attachment may be pleaded. The case of *Belcher vs. Grubb.* 4 *Harring. R.* 461, is distinguishable from this. There, both claimants were within the same Court. Belcher was seeking to collect a judgment against Grubb while a foreign attachment was pending against him in the same Court. His judgment debtor being summoned as a garnishee and having answered in the foreign attachment, the Court stayed his execution until he should appear in the foreign attachment. In this, the Court only exercised its equitable power over its own process, proceeding on the ground that a debtor ought not to use the process of the

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Court until he should submit to its process against him. In 13 *Peters Sup. Ct.. R.* 107, an attachment issued after suit brought could not, it was held, be pleaded as a defence. This was on the principle that priority of suit determines the right, in order to prevent a conflict of jurisdiction. The same principle protects a debt in judgment, as well as a debt in suit.

3. As to the set off—Webster's remedy for his judgment against McDaniel upon the security given in the appeal, being an ample remedy at law, deprives him of any equitable claim. He is seeking simply to enforce a legal claim in a court of equity, which cannot be done. *Chanc. Dig.* 1202; *Moses vs. Lewis*, 12 *Price Exch. R.* 402; *Hurst vs. Pearce*, 4 *Ib.* 339.

Bates, in reply, on the right to an interpleader.

The complainant is none the less an indifferent party because he claims to set off the small sum of $21.34. That leaves of McDaniel's judgment against him more than sufficient to cover Johnson's claim of $134. *As to that* he stands indifferent and ready to pay either claimant. Nor has he, as argued, sought to favor either claimant. His answer was under attachment; nor could it have been other than as it was. The intervening levy, made after he was summoned as a garnishee, could not vary the rights of the parties. They were fixed by the garnishment.

HARRINGTON, CHANCELLOR.—This is a proper case for interpleading, upon the principles which govern that proceeding. Webster owed a debt by judgment to McDaniel, which was attached by Johnson. After Webster was summoned as a garnishee, but before his answer, execution was levied under the judgment. He was afterward compelled to answer, judgment was rendered against him on his

answer, and he was obliged to pay the whole of McDaniel's claim to the sheriff, notwithstanding this judgment. He is thus subject to the claim of both McDaniel and Johnson for the same debt, to the extent of Johnson's judgment; and he is indifferent as between them. The fund is still subject to the decree of this Court, having been paid to the sheriff with notice and being still in his hands. It is, therefore, liable to be litigated between McDaniel and Johnson; and the complainant, so far as this disputed fund is concerned, is in a position equitably to require its litigation and settlement between them for his protection. The complainant claims, as against another part of the fund now in the sheriff's hands, to set off in equity his judgment, since recovered against McDaniel; but this claim does not make him obnoxious to the charge of mixing himself up with the contestants' interpleading, because his claim does not apply to any part of the subject of that contest; neither does his delay in answering to the garnishment, under the circumstances, nor the special character of his answer when made, show any such preference for either of the contending parties as will deprive the complainant of his right to the interpleader on the ground of partiality.

On the main point, I think that the debt due by judgment from Webster to McDaniel was liable to be attached in Webster's hands to satisfy the debt due on the judgment of Johnson against McDaniel. This is in effect the decision in *Belcher vs. Grubb.* 4 *Harring. R.* 461; for it cannot be maintained that any species of property, liable to process of foreign attachment, cannot be reached on execution attachment. The principle of that case is that whatever a man owns as a means of paying his debts may be attached by his creditors; and there is nothing in this case, arising from the fact that the debt attached is due by judgment, to raise a conflict of jurisdiction or of process, though after the garnishment it was levied by the sheriff under

execution process; for the whole matter is here under the control of the Court and the fund subject to its order.

I have no difficulty in decreeing the set off. It is true, both these judgments are legal demands. Had they been recovered in the same Court they might have been set off at law under the equitable power of the Court over its own judgments. But, being recovered in different Courts, there is no remedy but in equity, and yet there is an equitable right for which relief ought to be given.

Let a decree be entered that Johnson's judgment be paid out of the money levied by the sheriff for McDaniel, and also the amount of Webster's judgment for $18.08, with interest and costs, recovered against McDaniel, which he is equitably entitled to set off against McDaniel's judgment, now demanded of him; and that the defendant, McDaniel, pay the costs.

Decree accordingly.

CHARLES SCHOCK *vs.* ALLAN V. LESLEY.

ALLAN V. LESLEY *vs.* CHARLES SCHOCK.

Kent, Sept. T. 1862.

A sale of land, in execution of a judgment on a bond accompanying a mortgage—the sale being for a part only of the debt secured by the bond and mortgage—does not discharge the mortgage as a security for the residue of the debt.

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C. S. having purchased from A. V. L. a farm, assigned to him, as the consideration therefor, a bond and mortgage for $4500, executed by J. F. payable in nine annual installments, of $500 each. At the same time, C. S. gave to A. V. L. his own bond and mortgage for $1500, made payable in three annual installments of $500 each, to correspond with the first three installments of the assigned mortgage, and took from A. V. L. a power of attorney, authorizing him "to collect" the first three installments of the assigned bond and mortgage, as an indemnity against his own bond and mortgage:—

Held that, upon the true construction of the agreement of the parties and of the power of attorney, C. S. was authorized to collect the first three installments of the assigned bond and mortgage by execution of a judgment entered on the bond, and not alone by voluntary payments from the debtor;

Held also that, independently of express agreement and on principles of general equity, C. S. being a surety for the first three installments, was entitled, to the extent of payments which had been made by him, to the benefit of all securities in A. V. L's. hands.

These were cross bills, filed under the following circumstances:

On the 22d of August, 1859, Allan V. Lesley sold and conveyed to Charles Schock a farm, situated in Kent county; and, for the consideration, Schock assigned to Lesley a judgment bond and mortgage of John Fleming for $4500. The bond and mortgage were payable in nine annual installments, of $500 each, the first falling due March 1st, 1859. Lesley also took from Schock his own judgment bond and mortgage for $1500, which was made payable in three annual installments, of $500 each, these installments being made to fall due so as to correspond with the first three installments of the Fleming bond and mortgage.

The sale referred to was made pursuant to a written agreement between the parties, whereby, after setting forth the terms of sale and that the bond and mortgage from Fleming was to be assigned to Lesley as the consideration,

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it was stipulated by Schock that he would secure to the said Lesley, by a mortgage on the above named farm purchased from the said Lesley, the sum of $1500 of the first three installments on said assigned mortgage and the interest on said $1500, to be paid to the said Lesley, as follows: *i. e.* in three installments of $500 each, with interest on the whole sum unpaid, on the first day of March in each of the years 1860, 1861 and 1862. It was further agreed that Lesley should give to Schock a power of attorney empowering him, "to collect the installments due on the said assigned mortgage and the interest due and to become due thereon, and to appropriate the same to the payment of the said mortgage of $1500, until the whole sum of $1500 and interest as aforesaid is fully paid and satisfied; and when the said $1500 and the interest thereon is fully paid, the said Lesley shall and will release the aforesaid mortgage of $1500 against the said Schock and take the aforesaid mortgage against the aforesaid Fleming without recourse to the said Schock, or any other property, real or personal that he may possess." Lesley on the 25th of August, 1859, gave to Schock a power of attorney authorizing him, in terms, "to collect the following sums from John Fleming, which are due or to become due on a certain mortgage which was given by him, the said Fleming, to the said Schock, and assigned by the last named to the undersigned, in accordance with the terms of an agreement entered into by and between the said Charles Schock and A. V. Lesley, as follows, to wit: $500, principal, and $45, interest, on or before March 1st, 1860; $500, principal, and $60, interest, on or before March 1st, 1861; and $500, principal, and $30, interest, on or before March 1st, 1862—said sums, when collected, to be applied to the payment of the installments and interest on a mortgage of the said Schock and wife to the said Lesley, dated September 2d, 1859."

Schock paid Lesley the first installment of $500 due

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March 1st, 1860, with interest on the whole $1500 to that day, according to the terms of his bond and mortgage. He had collected from Fleming only $150; and being unable, as alleged in his bill and in his answer to Lesley's cross-bill, to collect from Fleming any more money by voluntary payment, and the second installment falling due, he proceeded by a *fieri facias*, returnable to the April T. 1861, on the judgment which had been entered on Fleming's bond at his suit for Lesley's use, to collect the first two installments, with the interest, for the purpose, as he alleged, of applying the proceeds to the installments of his own bond and mortgage, now due and payable to Lesley, pursuant to the objects of the power of attorney. No goods of Fleming being found, the *fieri facias* was levied upon his land, being the same described in the mortgage assigned by Schock to Lesley; and the land was about to be sold under a *venditioni exponas*, returnable to the April T. 1862, when Lesley, for whose use the judgment on the bond stood, interfered and forbade further proceedings by Schock under the judgment. Schock also sued out a *scire facias* on the Fleming mortgage to the April T. 1862.

At this stage, Schock filed his bill, claiming that Lesley should account for and give credit to him for all moneys collected from him or from Fleming, the same to be credited on his (Schock's) bond and mortgage; that he should be permitted to collect by execution against Fleming the sums specified in the power of attorney, being the first three installments of the Fleming mortgage, and to apply, of the proceeds of the execution, $405 to his own use, being the accrued interest reserved out of the assignment, and the residue to reimburse himself for the $1500 secured by his own bond and mortgage to Lesley. The bill insisted that the sole object of giving his own bond and mortgage to Lesley for $1500 was to secure the payment of the *first three installments* of the Fleming bond and mortgage, and

that any sums he might have to pay to Lesley he was entitled, under the power of attorney, to reimburse himself out of the first three installments of the Fleming bond and mortgage, he being ultimately responsible, as his bill claimed, only for the difference between what could be made out of Fleming under the first three installments and the $1500 with its interest. The bill prayed that Lesley should be enjoined from revoking the power of attorney or interfering with Schock's right to execution of the judgment against Fleming; also enjoining Lesley from collecting by execution against Schock the third and last installment on his bond and mortgage.

Lesley filed a cross bill, not differing from Schock's in the general facts set forth, but insisting upon a different construction of the transactions between them—that Schock's bond and mortgage for $1500 was given as a collateral security for the whole amount of the Fleming bond and mortgage, Lesley not considering the property mortgaged by Fleming worth $4500; that under the arrangement Schock was to pay him the $1500 secured by his own bond and mortgage, leaving Lesley to depend upon the Fleming mortgage only for $3000; that Schock was to be reimbursed by such *voluntary* payments as he could get from Fleming, for which purpose only the power of attorney was given him, and also out of any excess which the property mortgaged by Fleming might eventually bring over and above the $3000 for which Lesley was to look to it. The bill prayed that Schock might be enjoined from attempting, by legal process, to collect any part of the judgment against Fleming or of his mortgage.

The answers of the respective parties to the bill and cross bill made the same claim which was set up in their respective bills; and, therefore, they need not be here set forth. The controversy turned upon the object for which

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Schock's bond and mortgage was given, whether as a collateral security for the whole of the Fleming bond and mortgage or only for the first three installments of it; also upon the construction of the power of attorney given by Lesley, whether it authorized the collection of the sums specified in it by process on the Fleming bond and mortgage or only by voluntary payments on the part of Fleming.

The two causes came before the Chancellor, at the Sept. T. 1862, for a hearing upon the bills, answers, exhibits and depositions.

C. S. Layton, for Schock.

W. C. Spruance and *J. P. Comegys*, for Lesley.

HARRINGTON, CHANCELLOR.—The papers establish this state of circumstances, surrounding the parties at the time of the contract out of which this litigation grows, and which is proper to be considered in ascertaining what that contract was. Dr. Lesley had a farm in Kent county, which he was willing to sell for $4500. Schock had a debt to that amount due him from John Fleming, secured by the bond of Fleming and a mortgage by Fleming and wife of a farm in Sussex. Lesley was willing to take that debt for his farm, but required an additional security for part of it. Schock agreed to mortgage the Kent farm for $1500, in order to secure payment of the first three installments of Fleming's mortgage; and Lesley agreed he should have the benefit of what could be collected from Fleming on these first three installments, to indemnify him for what he should pay on his mortgage, and that he should have the use of these securities, one or both, to enforce the payment of these three installments from Fleming. In pursuance of this agreement a letter of attorney was made by Lesley,

authorizing Schock to collect the said first three installments due or to become due on the Fleming mortgage. After that, the balance was to be held by Lesley for his own use, at his risk. And here commences the first dispute. On the part of Dr. Lesley it is said that this power of attorney does not extend to the Fleming judgment, does not even mention it; and that the agreement did not extend to it; and it is argued by his solicitors (with great force, if their premises are correct) that, unless this is so by the terms of the agreement, he cannot be taken to have intended to give Schock the power to execute the judgment against the mortgaged farm, for that would remove the lien of the mortgage. On the other side, it is said that the power to collect the first three installments of the Fleming debt includes the use of the judgment security as well as the mortgage; that this was the very matter about which they were dealing; that without it Schock had no power to collect the installments, since he could not sue on the mortgage, which was not due; and that an execution of the judgment, even against the mortgaged farm, to collect these installments would not remove the mortgage lien as to the balance.

This, therefore, is an important consideration in ascertaining the extent of the agreement.

Schock mortgaged his farm to guaranty to Lesley the payment of $1500 and interest, being the first three installments of the Fleming debt; and Lesley agreed he should have these installments to indemnify himself, if they could be collected, and that he should have power to collect them from Fleming. He held two securities, viz: a mortgage, recorded in February, 1857, not yet due, and also a judgment, entered in March, 1857, on which one or more of the installments were due. Now, on principles of general equity, independently of express agreement, Schock, being

the surety of Fleming to the amount of these three installments, would have the right to use all the securities in Lesley's hands; and by the contract Lesley agreed he should have some power to collect them from Fleming for his own indemnity. But, he could give no power to use the mortgage for this purpose until it was due; and all this bargaining about giving such power and the making of the letter of attorney itself was about nothing and useless unless it extended to the judgment. With that construction it executed precisely the object of the party, unless such a use of the judgment removed the mortgage lien for the residue. It secured to Dr. Lesley $1500, the first three installments, or their equivalent, from Schock's mortgage, gave Schock his indemnity, and left Lesley his lien under the Fleming mortgage for the balance.

The effect of a sale of the Fleming land under the judgment is then proper to be considered.

A mortgage is merely a security for payment of the mortgage money. This is granted. It is a specific lien on the mortgaged premises for that purpose, while the judgment security is a general lien on all the land of the debtor. But the mortgage, though a security for the payment of money, is a security by way of conveyance of title to land, giving the mortgagee the power, through a purchase, to complete his title to the land. Before forclosure the mortgagor has only the right to redeem, on payment of the mortgage money—a right so valuable and so distinct that he is in some respects, while in possession, regarded as the owner of the land. But his right is only an equity of redemption. By the terms of the mortgage he admits this to be the position of himself and the mortgagee in relation to the land; and this mere security for the payment of money, as it is almost sneeringly called, is after all a serious dealing with the title, and carries with it the property unless the money is paid.

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The judgment against Fleming bound all the title he had in any land in Sussex county—this, as well as other land. His title to this was an equity of redemption only—a right liable to be sold by execution of this judgment; and when Lesley agreed to give Schock the power to "collect" these installments of the assigned mortgage he could have referred to no other means of executing that power than by an execution of the judgment. On such an execution the sheriff would sell only the right which Fleming had, which was a right to have the land back on payment of the balance of the mortgage money, which is usually called selling subject to the mortgage.

I note the fact, though I do not wish to lay stress upon it, that the Fleming mortgage is older than the judgment; and it is the general rule that land sold on a judgment is subject to prior mortgages, and is so sold. But I wish to decide the naked question raised in this cause, that land sold on a judgment accompanying a mortgage, for one installment of the mortgage money, is sold subject to the remaining installments of the mortgage. A different opinion destroys the value of a double security for the payment of mortgage money. It is the constant practice to sell land and secure the purchase money by a bond payable in installments and a mortgage of the premises at the same time. The installments can be collected on the bond, as they fall due. If they cannot be thus collected, without destroying the mortgage lien for the balance, it were better not to have the bond.

A case illustrating this point occurred recently in this county. A. sold to B. a farm for $1800, and took security by bond and mortgage. The payments were fixed at long intervals. A. executed the bond for the first installment of $300, and the land sold (supposed to be subject to the mortgage) for $35. If it were not so subject, the purchaser

would take the farm for $35, and the mortgage security, not yet due, would be worthless.

It is important, therefore, for it to be known whether the principal security on which the people of this State usually rely for their large investments is any security at all, binding on the land mortgaged or pledged to secure it, or whether it can be defeated and its value destroyed by the collection of any other debt of the mortgagor or even by the enforcement of another security for a part of the same debt.

Let decrees be entered in accordance with this opinion, that is, dismissing Lesley's bill; and in the case of the bill filed by Schock restraining Lesley from revoking his power of attorney, or otherwise interfering with Schock's right to collect by legal process the first three installments of the Fleming mortgage and judgment; Lesley to pay the costs in both cases.

These decrees were reversed by the Court of Errors and Appeals, at the June T. 1865. The appellate Court considered that, upon the true construction of the power of attorney given by Lesley to Schock, the latter was authorized to collect the first three installments of the Fleming mortgage and judgment only by receiving voluntary payments from Fleming, and not by legal process upon the mortgage or judgment. See 3 *Houston's Del. Repts.*, 130.

Statement of the case.

ROBERT B. ROBINSON, PETER ROBINSON and ZADOC MILBY,

vs.

PETER R. BURTON and JOHN H. BURTON.

Sussex, March T. 1868.

Goods bequeathed in trust came to the hands of the administrator c. t. a. who filed an inventory and appraisement of them and charged himself with their value in an administration account. *Held*, that they were not thereby converted, so as to be subjected to execution for the administrator's debts.

An injunction, granted on petition, being dissolved for want of a bill filed at the ensuing term, an action at law was brought on the injunction bond, and judgment taken subject to an agreement of counsel that it should await the result of the chancery suit, a bill then having been filed. Upon a final decree sustaining the bill, further proceeding under the judgment on the injunction bond was restrained.

This bill was filed under the following circumstances:

Polly Burton, by her last will and testament, devised her real and personal estate, after the payment of her debts and funeral expenses, to Henry Burton, in trust for the separate use of Sally Burton, wife of John H. Burton, one of the defendants. The personal property came into the hands of John H. Burton, as the administrator c. t. a. of Polly Burton, deceased. He filed before the Register of Wills an inventory and appraisement of the personal estate, which consisted mainly of goods in specie, and passed an account charging himself with the amount of the appraisement, and being allowed, as a credit, $38.40 for funeral expenses paid by him. Afterward the goods were taken in execution as the property of John H. Burton, under a judgment against him at the suit of Peter R. Burton one of the defendants. Henry Burton, named as trustee in the will, being absent

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from the country and there being no acceptance of the trust, Robert B. Robinson was appointed trustee by the Chancellor; and in October 1859, he obtained by petition an injunction to restrain Peter R. Burton from selling the goods in question under his execution against John H. Burton. No bill being filed by Robinson, the trustee, at the ensuing term, the injunction was dissolved for want of prosecution; and, thereupon, Peter R. Burton, whose execution had been enjoined, brought an action at law upon the injunction bond against Robinson, as the principal, and the other complainants in this suit as his sureties. Pending the action on the injunction bond, in October 1861, Robinson, the trustee, together with his sureties in the injunction bond, filed this bill, setting forth the premises, and praying that Peter R. Burton should be perpetually enjoined from process against the goods under his judgment against John H. Burton, and that the goods might be delivered to the complainant, Robinson, to hold subject to the trusts of the will of Polly Burton, deceased; also praying that the action at law upon the injunction bond might be stayed until a final decree in this cause.

The defence mainly relied on by the answers was, that the filing of an inventory and appraisement of the goods by John H. Burton, as administrator, and his charging himself with their value in his administration account, was a conversion of them, and subjected them to execution for his debts, the remedy of the trustee being upon John H. Burton's administration bond. The answers also insisted that the dissolution of the injunction, for a failure of the complainant, Robinson, to file his bill at the term after it issued, was an absolute breach of the injunction bond; and that a suit upon the bond could not be enjoined upon a bill afterward filed.

No preliminary injunction was issued to stay the action

upon the injunction bond, but the same was prosecuted to judgment, subject to a written agreement of counsel that the judgment should "in all things await the final decree of the Chancellor in the case pending in the Court of Chancery, and that no proceeding should be had or taken upon the judgment until a decree should be made by the Chancellor."

The cause came before the Chancellor, at the March T. 1863, for argument upon the bill, answers, exhibits and depositions.

A. R. Wootten and *A. P. Robinson*, for the complainants.

J. H. Paynter and *C. M. Cullen*, for the defendants.

HARRINGTON, CHANCELLOR.—The property which was originally in contest between Robert B. Robinson, as trustee for Sally Burton, and Peter R. Burton, a creditor of her husband, was trust property for the most part in specie, never having been converted. It was made subject, to be sure, to the payment of debts and funeral expenses; and for that purpose it was in the power of Polly Burton's administrator, and liable, on conversion, to be divested of the trust; but, except for about $38, it was not needed for debts or funeral charges, and was in fact never converted. The filing an inventory and appraisement and passing an account by the administrator was not a conversion of the property. The identical articles still remained and were followed by the trust. In this condition they were seized by Peter R. Burton, on execution, as the property of the administrator and for the payment of his debts. Sally Burton's trustee obtained an injunction by petition, and the other complainants became sureties in an injunction bond, with condition to pay the execution, or so much as the Chancellor should decree, and to perform the decree. The

injunction was dissolved for want of diligent prosecution, no bill having been filed. A suit was brought at law against these complainants on the injunction bond; and judgment was recovered on a written agreement of counsel that the judgment should in all things await the final decree of the Chancellor in the case now pending in the Court of Chancery, and that no proceedings should be had or taken upon said judgment until such decree is made by the Chancellor.

Without this agreement the Chancellor would not interfere with the proceedings at law, which were regularly had upon a forfeited bond, pending which the original complaint was regularly proceeding in this Court by bill and answer. But, the judgment at law having been taken subject to the final decree here, is no obstacle to the proceeding in this cause on its original equities; and, the trust being established and the trust property ascertained, I have no difficulty in deciding that it was not subject to the debts of John H. Burton, nor liable to be seized on the execution of Peter R. Burton.

Let a decree be entered, perpetually enjoining the defendant, Peter R. Burton, from further process against the goods in controversy, and ordering that John H. Burton deliver the goods to the complainant, Robinson, as trustee under Polly Burton's will, upon the payment to John H. Burton of $38, due him as administrator. Also, let Peter R. Burton be perpetually enjoined from execution upon the judgment recovered at law upon the injunction bond.

Decree affirmed by the Court of Errors and Appeals at the June Term 1865. See 3 *Houston's Del. Rep.* 154.

Statement of the case.

HENRY F. HALL,

vs.

NATHANIEL W. HICKMAN and JOHN W. WALKER.

Sussex, March T. 1864.

H., being indebted to W. on a note under seal for $109, took from a third party an assignment of a note of W. for $58.83, with the knowledge of W. and with the understanding between the parties, that it would be credited against the note for $109. *Held*, that the equity to such credit attached to the note for $109, and followed it into the hands of an assignee, though without notice.

This was a bill for an injunction and for an account, embracing sundry particulars; but the only question argued and adjudged concerned a claim by the complainant of set off against a note after its assignment to a third person, under the circumstances following:—

On the 12th of June, 1858, the complainant executed his note, under seal, for $109 to the defendant, John W. Walker, for money loaned. Walker was at the time indebted to the complainant on book account, which, it was agreed, should not be affected by the note. Afterward, on the 9th of June, 1859, a settlement was made between Walker and David Hall, the son and partner of the complainant, including the account of the complainant, and Walker gave his note to David Hall for $58.83. This note was assigned to the complainant on the 6th of March, 1860, with the knowledge of Walker, and with the understanding between him and the Halls, that it would be credited against the note for $109. After these transactions, on the 31st of December, 1860, Walker assigned the note for $109, to the other defendant, Hickman, in the form re-

quired by the statute for the assignment of bills and specialties. Hickman proceeded to collect the note by execution, against which this bill was filed, the complainant claiming to set off the note for $58.83, due from Walker, against the note for $109, though the latter had been assigned to Hickman. Other defences were taken against the residue of the latter note, but they were not sustained by proof.

The cause came before the Chancellor, at the March Term, 1864, for a hearing upon the bill, answer, exhibits and depositions.

C. S. Layton, for the complainant.

A. P. Robinson and *A. P. Robinson, Jr.*, for the defendant.

HARRINGTON, CHANCELLOR.—There was always an equity between the complainant and the defendant, Walker, to have the former's book account credited against his note for $109; and from the time of the assignment to him of the note for $58.83, if not before, the same equity applied to it.

This equity followed the note for $109 after its assignment to the defendant, Hickman, upon the principle decided in *Oliver, use of Griffith, vs. Lowry*, 2 *Harring. R.* 467. It grows out of the nature of the transaction—the purpose for which the note for $58.83 was assigned to the complainant, with Walker's concurrence; and the equity attaches to the note itself. Walker had not the right in equity (perhaps not at law) to collect the whole amount of this note of the complainant, and he could assign to Hickman no other right than he had. It was not subject strictly to a set off of the smaller note, but there was an equity between the parties, attaching to the larger note, which prevents its collection without allowing the smaller

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note as a deduction, and this equity follows it into Hickman's hands, even without notice; for he could take no more by the assignment of the note for $109 than Walker was entitled to. If, instead of giving his note to David Hall, which was afterward assigned to the complainant, to be abated or deducted from the $109 note, Walker had given to the complainant a receipt for $58.83, as paid on account of it, the subsequent assignment of that note to Hickman would, unquestionably, have been subject to this payment. It is equally subject to the equity which, as against Walker, entitled the complainant to a credit of the note for $58.83. Let a decree be entered, crediting this note against the judgment on the note for $109, and dissolving the injunction as to the residue.

JOHN L. RUSSELL, and DAVID F. CRAIGE and WILLIAM TATNALL, trading as CRAIGE & TATNALL,

vs.

THOMAS THATCHER and MARY ANN, his wife, et al.

New Castle, Feb. T. 1864.

A voluntary conveyance is void as against creditors holding debts previously contracted.

A husband, having reduced to his possession funds to which he became entitled in right of his wife, cannot subject them to a voluntary trust for the wife to the prejudice of creditors.

CREDITOR'S BILL TO SET ASIDE A VOLUNTARY CONVEYANCE. —The defendant, Thomas Thatcher, by a deed dated De-

Statement of the case.

cember 26th, 1857, conveyed a house and lot, situated in Wilmington, to Edward McInall, upon certain trusts for the sole and separate use of his wife, Mary Ann Thatcher, during her lifetime, and after her death for the benefit of her children. The nominal consideration of the deed was $1000, which represented the estimated value of the property over and above a mortgage upon it for $1500. Nothing was in fact paid by McInall, the trustee. Prior to and at the date of the conveyance, Thatcher was indebted to the complainants, John L. Russell and Craige & Tatnall; for which debts judgments were afterward recovered; Russell recovering a judgment for $107.06, and Craige & Tatnall recovering two judgments for $100 each. On these judgments execution process was issued, and levied upon the house and lot which had been conveyed in trust. Thereupon, this bill was filed, charging that the conveyance was voluntary and in fraud of Thatcher's creditors, and praying a decree that the deed should be declared void; that McInall, the trustee, should account for the rents and profits, to be applied toward satisfaction of the debts, and that the property should be sold for any deficiency.

The defence taken by answer was that some years previous to the conveyance Thatcher had received from the estate of his wife's father, in her right, certain sums of money which he had held, to be invested for her use; and that the house and lot was purchased with this fund. The answer also alleged that at the time of the conveyance Thatcher was not insolvent.

It was proved that some years prior to the conveyance, in the years 1850, 1851 and 1852, Thatcher had received from the estate of William Coleman, his wife's father, sundry sums of money, amounting to $593.21.

The cause came before the Chancellor, at the Feb. T. 1864, for a hearing upon the bill, answer, exhibits and depositions.

Argument.

J. C. Patterson, for the complainants.

The wife has no equity for a settlement out of her property after it has been reduced to her husband's possession. 2 *Sto. Eq. Jur. secs.* 1369, 1372, 1402, 1403; *Clancey on Married Women*, 440, 458, 2 *Atk. R.* 420; 1 *P. Wms.* 459, 383; 10 *Ves. Jr.*, 90; 2 *Kent's Com.* 141; 2 *Johns. Ch. R.* 206; 4 *Bouv. Ins.* 275. The deed was, therefore, wholly voluntary, and void as to creditors under the statute of 13 Elizabeth.

But, even if the wife had an equity in consideration of the fund received from her father's estate, that amounted only to $593.21, a sum much less than the value of the property, and leaving sufficient to cover the debts of the complainants. Equity will, at least, relieve by decreeing a sale, and the application to the debts of any surplus after satisfying such equity as the wife may have. *Reed vs. Livingston*, 3 *Johns. Ch. R.* 481.

G. B. Rodney, for the defendants.

This was not a voluntary conveyance, being made for a meritorious consideration, viz: the wife's equity. Though the husband had reduced the fund into his possession and was not obliged to make the settlement, yet, it being such as equity would have enforced, had the fund been within its control, the Court will recognize and give effect to it when voluntarily made. 1 *Roper on Husb. and Wife*, 321, 196, (32 *Law Lib.*) It does not matter that the settlement somewhat exceeds the property received for the wife, if it be not so violently disproportionate as to shew fraud. 67 *Law Lib.* 294; *McQueen on Husb. and Wife*, 377; 2 *Sto. Eq. Jur. secs.* 1415, 1377*a*; 8 *Paige Ch. Rep.* 161.

But, supposing the conveyance were voluntary, that alone will not avoid it. The statute proceeds on the ground of fraud; and, though the decisions vary, the law is that

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fraud must be shewn. If indebtedness be relied on as evidence of fraud, it must amount to insolvency. 3 *Barn & Adolph*, 362; 2 *Kent Com.* 440, *n.*; 8 *Cow. R.* 406; *Cowp. R.* 432; 11 *Wheat. R.* 199; 8 *Mees & Wels.* 405; 3 *U. S. Eq. Dig.* 249; 1 *Sto. Eq. Jur. secs.* 359–365. In this case Thatcher was not insolvent, and there is no evidence of fraud in fact or purpose.

HARRINGTON, CHANCELLOR.—Upon consideration of this case, I am prepared to make a decree, charging the trust fund with so much of the debts of the complainants as were contracted prior to the date of the trust deed. It is true, that part of the money invested in the property conveyed by the deed in trust, (or its equivalent) was received by Thatcher from his wife's property; but it was received and originally invested by him as his own, and in his own name; and he could not subject it to a voluntary trust after he had incurred debts, and that possibly on the credit of this property.

A decree was entered charging the property with so much of the debt due the complainant, Russell, as was incurred prior to the date of the trust deed; also, with the debt due the complainants, Craige and Tatnall, and ordering a sale of the property to raise these sums, if not paid within thirty days.

Statement of the case.

MARIA COLLINS,

vs.

JAMES A. SERVERSON.

Kent, Sept. T. 1864.

A trustee having a discretion as to the time and amount of payments to be made of a trust fund for the benefit of a married woman, his refusal to make any payment is a breach of trust, against which the court will relieve.

BILL AGAINST A TRUSTEE FOR ENFORCEMENT OF THE TRUST AND SECURITY:—Deborah Layton by her will devised the residue of her estate to her executors, in trust for the benefit of her daughter, Maria Collins, a married woman. The trustees were invested with the discretion to pay the money to Mrs. Collins, from time to time, to secure or advance her comfort, the declared object of the trust being to secure the fund against the control of her husband. The trustees were empowered to bring the money into the Orphans Court, to be invested under the direction of the Court. There was a clear residue of the estate of testatrix of $1544.45, which came to the hands of the defendant as the sole executor and trustee, the other executor named in the will having renounced.

The bill charged that no part of the trust fund had been applied by the defendant to its purposes, either by paying it to Mrs. Collins, or by bringing it into the Orphans Court. It further charged that the fund was held upon no security other than the testamentary bond given by the defendant upon his appointment as executor, which was alleged to be inadequate. *Prayer*, that the defendant be decreed to give security for the fund, and to execute the trust.

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The answer admitted the trust and the receipt of the fund by the defendant, but denied that he was abusing the trust or endangering the fund. It insisted that the testatrix had entrusted the money to him without requiring security, and with a discretion to judge what part of it he should pay to Mrs. Collins; that, therefore, there was no case for the interference of this Court.

E. S. Reed and E. Ridgely, for the complainant.

J. P. Comegys, for the defendant.

HARRINGTON, CHANCELLOR.—I am in some doubt whether the complainant has made out a sufficient case of insecurity of the fund to warrant the interposition of the Chancellor on that ground alone. But there has been a failure to execute the trust; and against that the Court will relieve. The trustee is bound to apply the money to the purpose of the trust, *i. e.*, the benefit of Mrs. Collins. It is true that the *time and amount* of the payments are in the discretion of the trustee, subject to the order of this Court; but to refuse or neglect altogether to pay her is practically to annul the trust. The Court will not permit that. The defendant must do what the will directs, or there must be another trustee. It appears that he has not executed the trust nor commenced to do it. He has neither made any payment to Mrs. Collins, nor deposited the fund in the Orphans Court under the direction of the will.

Let a decree be entered that the defendant pay to the complainant, within thirty days, the accrued interest on the trust fund, or that he deposit the same in the Orphans Court; and that upon default he be removed from the trust; also that he pay the costs.

Statement of the case.

GEORGE JONES,

vs.

JOHN RANDEL, Jr, and LETITIA his wife, WALTER WILLIAMSON and MARY MATILDA his wife, and SARAH ANN ERWIN.

New Castle, Feb. T. 1865.

A trustee of a fund in which his wife, with others, was interested, having failed to pay over money collected by him on account of the fund—*held*, that the wife's share of other money, received by a succeeding trustee on account of the trust fund, was not liable for the unpaid shares of the other *cestuis que trust* in the money collected by her husband.

In such case, the husband's failure to pay over the money collected by him cannot be taken to be a *reductio ad possessionem* of the wife's share of trust funds then uncollected.

The wife's *chose in action*, not reduced into the husband's possession, cannot be taken for the payment of his debt, at law or in eqnity.

Property of the wife cannot, in equity, be taken for payment of the husband's debt, without subjecting it to her equity, which, under the circumstances of this case, was sufficient to protect the whole fund.

BILL OF INTERPLEADER.—Sarah Dawson, by her will made in 1822, bequeathed the residue of her estate, consisting of certain lands, stocks and other property to her executor, in trust for sundry legatees for life, and after the expiration of the life estates, then to be divided equally between her three nieces, two of them being the wives respectively of John Randel, Jr. and Walter Williamson, and the other a widow, Sarah Ann Erwin. John Randel Jr, after an intervening executorship, became the administrator c. t. a., and the trustee of the property; but in 1855 he was

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removed from the trusteeship,and the complainant appointed in his place. On the settlement of Randel's administration accounts he was found indebted to the trust estate to the amount of $1746.64, which was never applied to the objects of the trust. The life estates having expired, the fund became payable in equal shares to Mrs. Randel, Mrs. Williamson and Mrs. Erwin. The complainant, the succeeding trustee, has now in hand $4800 of the trust fund, with some accrued dividends, divisible in like manner.

Randel's administration bond is barred by the statute of limitations,and he is insolvent. Under these circumstances, Mrs. Williamson and Mrs. Erwin claim that in the distribution of the fund in the complainant's hands,Mrs. Randel shall be charged with the sum of $1746.64, received by her husband and not paid over, insisting that Randel's failure to pay was equivalent to an application of the money in his hands towards payment of so much of his wife's share of the whole trust fund. Mrs. Randel claims her full share of the fund now to be distributed, contending that Randel's liability as trustee was for his own debt, which might have been recovered by timely proceedings on his bond, and that her portion of the trust fund ought not to be liable for it.

The cause came before the Chancellor on a bill of interpleader filed by the complainant, and upon answer of the defendants, setting up their respective claims as above stated, and was heard at the Feb. T. 1865.

J. C. Patterson, for the complainant, and also representing Mrs. Williamson and Mrs. Erwin.

G. B. Rodney, for Mrs. Randel.

HARRINGTON, CHANCELLOR.—The claim of Mrs. Williamson and Mrs. Erwin proceeds upon the ground that Randel,by retaining the money coming to his hands on account

Syllabus.

of the trust fund, must be taken to have applied it to his wife's interest in the whole fund. But, it is to be considered that at the time Randel received his part of the fund the proceeds afterward accounted for by the complainant, the succeeding trustee, were not due to the legatees, and Randel could not then so apply the fund in his hands, as is insisted. The case presented is, therefore, that of a creditor demanding a wife's *chose in action*, not yet reduced into possession, in payment of her husband's debt. This is not allowable, either at law or in equity.

Again, a court of equity would not allow a creditor of the husband to take the wife's property, coming to her independently of the husband, in payment of his debt, without subjecting it to the wife's equity; and her equity in such a case as this would protect the whole fund.

Let a decree be entered that the complainant divide the fund equally between the legatees, after deducting the costs.

JOHN S. KERSEY and JOHN P. EMERSON,

vs.

JOHN M. BAILEY and PENNEL EMERSON, Sheriff.

Kent, March Term, 1865.

Principle of relief in equity against forfeitures stated.

Executors gave a bond for payment of a legacy, subject to an agreement that any legal and proper abatement from the legacy, if ascertained before the bond became due and payable, should be credited; otherwise, that the bond should be absolute. Upon a failure to ascertain

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the amount to be abated from the legacy, before the bond became due and payable,—*held*, that the failure being through default of the executors a court of equity will not extend the time for ascertaining the abatement.

BILL TO BE RELIEVED OF A FORFEITURE.—The complainants, as executors of John D. Anderson, deceased, gave to the defendant, John M. Bailey, their bond, dated April 20th, 1861, for a legacy of $500, bequeathed to him by the then testator, payable October 20th, 1861; subject, however, to an agreement that if at any time before the same should become due and payable, on the 20th day of October, 1861, it should satisfactorily appear that any abatement of said legacy was proper and legal and that such abatement ought to be made, that the amount so to be abated from this legacy should be credited on the bond; but if before the time specified for payment of the bond such abatement, if any, should not be ascertained, by agreement or otherwise, then the bond should be deemed to be absolutely due and might be collected.

The amount of the abatement was not ascertained, by agreement or otherwise, before the time specified for payment of the bond; nor had it been ascertained at the filing of the bill. The complainants claimed that by an account, passed by them as executors on the 11th of April, 1862, it appeared that a large abatement would be necessary to be made on all the pecuniary legacies. The amount of such abatement could not be now ascertained, because it was as yet doubtful what would be the amount of some of the pecuniary legacies. For, the testator had bequeathed to these executors five years' interest on all his interest paying credits, the amount of which did not appear. He had also devised to the complainant, John P. Emerson, a farm, with directions to his executors to erect certain buildings on it, at a cost not to exceed $8,000: and, if less than that sum should be required, then the difference was bequeathed to John P. Emerson as a legacy. The testator also devised

to another person, a farm, with directions to erect upon it certain buildings described in the will. These buildings had not been erected; and, in consequence, the cost of the building in the first instance and the excess of the $8,000 over the cost, in one case given as a legacy, could not be ascertained. Nor was the amount of the legacy to the executors as yet ascertained.

John M. Bailey, the obligee in the bond, having proceeded to collect it by execution, this bill was filed to be relieved against the limitation of time in the bond, and that further process to collect the bond should be enjoined until the amount to be abated from Bailey's legacy could be ascertained. A preliminary injunction was granted.

The cause came before the Chancellor, at the March Term, 1865, for a hearing upon the bill, answer and exhibits.

C. H. B. Day and *J. P. Comegys*, for the complainants.

E. Saulsbury and *N. B. Smithers*, for the defendants.

HARRINGTON, CHANCELLOR.—The ground upon which this case has been put by the complainants is the well-known principle of equitable relief against a forfeiture. Forfeitures are not favored in equity. They are regarded as a rod by which to compel the performance of a contract, but not as of the essence of the contract. A contract is binding in equity as much as at law; but where a court of equity can enforce performance of the contract, it will relieve from penalties for not performing it strictly in the mode or time contemplated, where time is not essential and it can compensate the party relieved against by its interference.

Is the present a case to which this principle applies? Are the complainants entitled to be relieved from the pay-

Statement of the case.

ment of this bond, because it is subject to an abatement, and to further time to show that it is so subject? The fact that the amount of the abatement is not yet ascertained results from the delay in erecting certain buildings directed by the executor to be erected on lands devised by him; also, from delay in ascertaining the amount of the legacies bequeathed to the executors. This delay, in each case, is the default of the complainants. They were bound by the will to erect the buildings, which, for aught that appears, they could have done. They have received and can account for the interest given to them as a legacy.

The complainants seek not so much to be relieved from a forfeiture as to have the contract time extended to enable them to establish a state of facts which will discharge the bond. This would be in plain violation of their contract which makes the time material in this respect. The non-performance of the condition, *i. e.* to ascertain the amount of the abatement within the time limited for payment of the bond, (October 20th, 1861,) was to make the bond absolute; and it has become so through the complainants' own default.

Under these circumstances I can perceive no ground in equity to relieve the complainants from payment of the bond according to the contract. Let the injunction be dissolved and the bill be dismissed with costs.

RICHARD HUMPHRIES,

vs.

JAMES C. WILSON and SUSANNA WILSON.

New Castle, September T., 1865.

A voluntary deed set aside, as against a creditor.

BILL BY CREDITOR AGAINST A VOLUNTARY GRANTEE.—

Opinion.

The complainant recovered a judgment against the defendant, James C. Wilson, on the 9th of November, 1861, for $276.84. Pending the suit, and before the judgment was recovered, Wilson conveyed a lot of land and house held by him to his sister, Susanna Wilson, the consideration expressed in the deed being $1,000. The deed bore date June 10th, 1861, and was not recorded until March 18th, 1862. The house and lot had meanwhile been levied on under a *fieri facias*, issued upon the complainant's judgment. James C. Wilson, also, a few days before the recovery of the judgment, confessed a judgment to William E. Riley, for $2,000. This was done without Riley's knowledge, and without any debt due him from Wilson.

The bill charged that the deed was voluntary and fraudulent, being made in order to defeat the complainant's judgment; and it prayed that the deed might be set aside, as against this judgment.

The answer alleged that the consideration set forth in the deed had been paid by Susanna Wilson.

Depositions were taken on the part of the complainant, tending to prove that Susanna Wilson had not sufficient means to purchase the property. There was no direct evidence of payment of the consideration.

The cause came before the Chancellor, at the September Term, 1865, for a hearing upon the bill, answer, exhibits and depositions.

G. B. Rodney, for the complainant.

C. B. Lore, for the defendant.

HARRINGTON, CHANCELLOR.—I cannot do otherwise than conclude, upon examination of the evidence and papers in this cause, that the conveyance of the houses and lot by

Syllabus.

James C. Wilson to his sister Susanna was voluntary, and was designed to avoid payment of the balance of Humphries' claim for building the houses, which was then contested and was in litigation. The time and manner of the conveyance and the insufficient proof of payment of the purchase money alike lead to this conclusion; and the confession by Wilson of a large judgment to Riley, when but little or nothing was due to him, and even without his knowledge, points to the same conclusion, as having the same object. Equity will not allow this. Humphries' claim for the building is now legally ascertained, and this property is equitably bound for it. I shall, therefore, decree that the deed be set aside as against Humphries' judgment.

THOMAS PICKERING,

vs.

CHARLES H. B. DAY and WILLIAM WHITAKER, Sheriff. *

Kent, September T. 1866.

The consent by a Collector of Internal Revenue that a Deputy Collector should use in his private business public funds collected by him, such consent not being communicated and assented to by the sureties of the deputy in an official bond given to the collector, discharges the sureties.

Such consent not sufficiently proved in the particular case.

A denial by the answer, responsive to an allegation in the bill, must prevail, unless it is overcome by the testimony of two witnesses, or of one witness with sufficient corroborating circumstances.

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* Another case, *Daniel McBride* vs. *the same defendants*, involving the same facts and principles, was heard together with the case here reported

Syllabus.

By Section 94 of the Act of Congress, entitled "An Act to provide Internal Revenue to support the Government, to pay interest on the public debts, and for other purposes," approved June 30th, 1864, an *ad valorem* duty of five per cent. was imposed upon "all manufactures of cotton, wool, silk, &c.," *or of other materials not in this act provided for*. *Held*, that molasses made from sorghum, not being otherwise provided for in the act, was subject to the *ad valorem* duty of five per cent.

The general rule of law as to the appropriation of credits is, that the debtor has the right, if he pleases, to make the appropriation. If he omits to do so, the creditor may make it. If both omit, the law will apply the payments according to its own notions of justice; and in cases of long and running accounts, where debts and credits are continuously occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due.

An exception to such general rule is the case of several official bonds executed by a collector or receiver of public revenue, at different times, with distinct sets of sureties. In such case, in the absence of any appropriation of payments made by the parties, money collected under a subsequent bond will not, before it is discharged, be applied in payment of a prior one; but a court of equity will so appropriate the payments as to give each bond credit for the money due and collected under it.

An apportionment of the amounts due on several successive official bonds, respectively indorsed on the bonds and signed by the sureties therein, is conclusive, in the absence of fraud or mistake.

Mistake, to avoid an agreement, must be a mistake, not of *law* but of *fact*; and it must be a plain mistake, clearly made out by satisfactory proof, not resting upon evidence loose, equivocal or contradictory.

The omission of a collector of public revenue to remove a deputy collector after knowledge of default by the latter, does not discharge the sureties of the deputy collector.

The provision of the act of Congress of June 30th, 1864, that a collector of Internal Revenue shall, before entering upon the duties of his office, execute an official bond, does not apply to collectors appointed under a prior act and who are continued in office under a saving clause in such prior act.

Provisions in statutes for the taking of official bonds are directory only, and not conditions precedent to the exercise of the office, unless expressed to be such.

Statement of the case—bill.

BILL IN EQUITY FOR THE RELIEF OF SURETIES.—The bill filed in this cause set forth the following case:

The defendant, Charles H. B. Day, was the Collector of Internal Revenue for the Collection District of the State of Delaware, under the act of Congress entitled "An Act to provide Internal Revenue to support the Government and pay interest on the public debt," approved July 1st, 1862, having been appointed to said office by the President of the United States prior to October 3d, 1862. On the said 3d day of October he appointed John F. Clements Assistant Collector for Division No. 9, of said Collection District, the appointment being made by an instrument partly written and partly printed, under the hand of Day and his seal of office, the instrument being made part of the bill. Soon after his appointment Clements gave bond to Day, with surety, as Deputy Collector. At that time, as the bill alleged, Division No. 9 was limited to Murderkill Hundred, Kent County; and Clements had no authority, as Deputy Collector, outside of said Hundred, except by a verbal authority afterward given by Day to Clements, authorizing him to act as Deputy Collector for Mispillion and Milford Hundreds in said county. Pursuant to this last appointment Clements gave Day another bond, dated June 18th, 1863, with Joshua R. Clements, William Smith, James Green and the complainant as his sureties. This bond was in the penal sum of $10,000, with a condition as follows: "The condition of this obligation is such, that if the said John F. Clements, being Deputy Collector of Internal Revenue for Division No. 4, of the Collection District of the State of Delaware, shall faithfully and diligently collect all the rates and taxes which he shall, according to the duplicate to be issued to him as Deputy Collector of Internal Revenue, be required to collect, and all taxes whatever which shall be committed to him for collection, and shall pay over the amount of all such rates and taxes at such time or times and in such manner and form as shall

be prescribed and directed by the said Charles H. B. Day, Collector of Internal Revenue for the District of the State of Delaware; and further, if the said John F. Clements shall perform the duties of his office, as Deputy Collector of Internal Revenue as aforesaid, in all things with fidelity, then the above obligation shall be void, otherwise to be and remain in full force and virtue." There was also annexed to the bond a joint and several warrant of attorney for the confession of judgment.

The bill further alleged that after the execution of said bond Clements entered upon the discharge of the duties of his appointment, and continued to act therein until on or about the 9th day of August, 1865, when the complainant and his co-sureties were informed by Day that Clements had failed to pay over the moneys collected by him under his appointment, and was a defaulter to a very large amount, viz.: between $10,000 and $12,000. Soon after the complainant and his co-sureties knew of the defalcation of Clements, they, together with Clements, met Day at his Collector's office at Dover. There were present also on that occasion, Nathaniel B. Smithers and Eli Saulsbury, Esquires, the former being the counsel of Day, and the latter the counsel on that occasion of the complainant and his co-sureties, the said counsel being present for the purpose of giving a legal opinion whether the last mentioned bond was not superseded and rendered unavailing by another bond which, after the giving of the said last mentioned bond, had been taken by Day from Clements, with Joshua R. Clements and Daniel L. McBride as sureties, in the sum of $5,000, with like condition as is heretofore set forth. At said meeting Day proposed to enter judgment on the two last mentioned bonds and issue execution against John F. Clements, but, as a preliminary step thereto, he required that an entry should be made and signed on said bonds, stating what amount was due on each of them, and this he said was essential to the issuing of the proposed

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execution. The bill alleged that under such impression Clements, with the complainant and his co-sureties, signed a writing on the bond, in which they were sureties, acknowledging that there was at that time due upon the same the sum of $7,680.88.

On the 10th day of August, 1865, Day caused judgment to be entered on the last-mentioned bond against Clements, severally, and caused execution to be issued thereon. The bill alleged that after the entry of said judgment and the issuing of the execution thereon the complainant and his co-sureties were informed by Clements, and so believe, that soon after his appointment Clements, finding the emoluments of his office would not justify him in discharging the duties thereof, and he then being engaged in the mercantile business with one William S. Prouse as his partner, he, the said Clements, called upon Day and informed him that he was unwilling to retain the office and discharge the duties thereof unless he, Day, would permit Clements to use the money to be collected by him, in his business as grain buyer and speculator; to which use said Day assented; that in consequence of such assent Clements and his partner, Prouse, under the firm name of John F. Clements & Co., did use the said money, as the same was collected by Clements, in their grain business; that by reason thereof, the grain business having proved disastrous, the defalcation occurred; that before said assent no defalcation had occurred; that the complainant and his co-sureties had no knowledge of the arrangement between Clements and Day for the use of the public money in said grain business until some time after their signing of the indorsement on the official bond of Clements. The bill alleged as corroborative of the fact that Day assented to the such use of money by John F. Clements & Co., in their business, that many of the payments made by Clements to Day were made by drafts of John F. Clements & Co., on their factors in New York and Philadelphia, to whom they

consigned grain in their business; and the bill referred particularly to nine of such drafts set forth at large in it.

The bill further alleged that in the month of July, 1865, the complainant called upon Day and asked him whether Clements was prompt in paying over to Day the money collected by him under his said appointment, and whether he was not at that time behind in his payments; that Day replied he was only a little behind—only a few hundred dollars; that such information had the effect to lull the complainant into security and make him believe there was no danger of loss.

The bill further alleged that after the complainant and his co-sureties had been informed of the use of the public money by John F. Clements & Co., they determined to resist the payment of any money on the said official bond, and as sureties so informed Day, who thereupon caused judgments to be severally entered against the complainant and his co-sureties, and also caused a *fieri facias* thereon to be issued against the complainant.

The bill relied upon several grounds of equitable relief, viz:

1. That the consent of Day, (without communicating such consent to the sureties,) that Clements might use the money collected under his appointment in the business of the firm of John F. Clements & Co., ought, in a court of equity, to relieve the sureties from all liability from the time such arrangement was made; and that all the money due from Clements to Day, under the bond on which the sureties were held, was collected by Clements after such assent was given, and was with such assent used by him in the business of grain buying by himself and his partner.

2. That the erroneous statement made by Day to the complainant had the effect of creating a false security as to the liability of Clements, and prevented the sureties from taking steps to secure themselves against the then existing defalcation of Clements.

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3. That the account of Day against Clements, as shown by Day at the time of the indorsements made on the bonds as before mentioned, was erroneous, because he had neglected to credit the said account with two checks given to Day by John F. Clements & Co. in part payment of the then existing indebtedness of Clements as Deputy Collector; both said checks being drawn on the Farmers' Bank at Dover, to the order of Day, one dated April 29th, 1864, for $225.62; the other dated February 7th, 1865, for $2,000; which said checks ought to have been credited by Day in the before mentioned ascertainment of the balance due on said bond.

4. That a part of the indebtedness of Clements, which is sought to be recovered from the complainant, is on account of rates, duties or taxes paid by the manufacturers of sorghum molasses to Clements; which, as the bill charged, was collected without any authority of law; and, therefore, the complainant could not be held liable for the money so collected. The bill prayed a discovery by Day of the sums collected on account of sorghum molasses.

5. That after the date of the bond to which the complainant and his co-sureties were parties other acts of Congress were passed, imposing duties and taxes not provided for by any law existing at the date of said bond; the collection and payment of which additional taxes were not in the contemplation of complainant and his co-sureties in said bond, and formed no part of the contract with Day; and for any defalcation by Clements in relation to any of the additional taxes imposed after the date of said bond the complainant and his co-sureties were not liable, either at law or in equity. And the bill particularly referred to an act of Congress entitled "An Act to increase the Internal Revenue and for other purposes," approved March 7th, 1864; also to an act entitled "An Act to provide Internal Revenue to support the Government, to pay interest on the public debt and for other purposes," approved June 30th,

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1864. The bill further insisted that as the act last referred to repealed the act of July 1st, 1862, except as to certain savings mentioned in said repealing act, Day had no authority to collect any taxes or assessments imposed by said repealing act, without a re-appointment and the giving of a new bond, as required by said act; and consequently he neither had nor could give to Clements authority to collect any taxes imposed by the act of June 30th, 1864. The bill alleged that Day had never been re-appointed, nor had ever given a new bond since the approval of the act of June 30th, 1864; nor had he since the approval of said act appointed Clements Deputy Collector; and the bill alleged that most of the money due from Clements, was for taxes and duties imposed by the act of June 30th, 1864. It also alleged that at the time of the signing of the indorsement on the back of the bond to which these sureties were parties, ascertaining the amount due thereon, the complainant and his co-sureties were ignorant of the fact that most of the money then due from Clements was for taxes imposed under the law of June 30th, 1864; and they did not then know that Day had not been re-appointed, and that he had not given a new bond, as required by said act; nor did they know that Clements was acting as Collector of taxes without proper authority of law; but that said Day at the time of the signing of said indorsement well knew all the facts aforesaid.

The bill prayed a perpetual injunction against the collection of the bond and for general relief.

The answer of the defendant, Day, admitted his appointment as Collector of Internal Revenue; that he was commissioned by the President, August 11th, 1862, and confirmed by the Senate; that afterward, on March 4th, 1863, he was again commissioned as Collector of Internal Revenue for the District of Delaware, to hold during the pleasure of the President; that under the authority of his office

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he divided the State of Delaware into twelve sub-districts or divisions, for each of which he appointed a deputy collector; and that he appointed John F. Clements Assistant Collector of Division No. 9, which was composed of Murderkill Hundred; that Clements, upon such appointment, gave bond in the penal sum of $15,000, with Thomas Pickering, James Green, Joshua R. Clements, William Smith, and Daniel L. McBride, as his sureties therein; said bond bearing date October 1st, 1862, and subject to the condition fully set forth in the answer. The answer admitted that Clements, as Assistant Collector of Division No. 9, had no authority to collect taxes from persons resident out of the limits of Murderkill Hundred; that he was verbally authorized by the defendant temporarily to collect taxes from persons resident in Milford and Mispillion Hundreds; that such verbal appointment was made because Peter L. Lofland, who had been appointed Assistant Collector for Milford and Mispillion Hundreds, had resigned, and there was no one to collect the taxes in those Hundreds; that no bond was required of Clements upon his verbal appointment to collect the taxes in Milford and Mispillion Hundreds.

The answer set forth a statement of the amount of all the lists of taxes which were delivered to Clements for collection prior to the first day of October, 1863, and the amounts paid by him prior to said date, and showing the balance existing against him at that time; and it averred the subsequent payment thereof out of the money returned as collected on said lists, and that the complainant and his co-sureties in the bond to restrain the collection of which the injunction was prayed for by the bill, were in no manner held liable or accountable for said sum or any part thereof, but that the same was paid by Clements by the application of sufficient funds derived as before stated in said answer.

The answer further averred that on the 1st day of Octo-

ber, 1863, the defendant, under the authority of his office, districted the State of Delaware into six parts; that each county embraced two parts, and that the hundreds of Murderkill, Milford and Mispillion, which had before constituted two parts, numbered 9 and 10, were then consolidated into one district or division, and called No. 4; that upon such new districting, on the 1st of October, 1863, John F. Clements was appointed Deputy Collector of Internal Revenue for District No. 4, comprising Murderkill, Milford and Mispillion Hundreds aforesaid, and a new deputation or letter of appointment was issued to him, of the same tenor as the one theretofore issued to him, except as to date, the district for which the appointment was made, and the substitution of the title Deputy Collector in the latter for Assistant Collector in the former; that upon such new appointment of Clements, the defendant required of him that he should execute a new bond, with surety for the faithful execution of his said office; and thereupon the said Clements, with Joshua R. Clements, William Smith, James Green, and Thomas Pickering, as his sureties, duly executed and delivered their joint and several bond in the penal sum of $10,000, with a condition thereunder written, which is fully set forth in the answer, and is the same as is stated in the bill of complaint, and to which was annexed a joint and several warrant of attorney for the confession of judgment for said penalty.

The answer further stated that the day and month of the execution was left blank in said bond at the time it was delivered to him, and continued blank until they were improperly filled by George M. Manlove, who was acting for the Prothonotary, at the time it was left in the Prothonotary's office, for judgment to be entered thereon against the said John F. Clements, but that said bond had been executed by the obligors therein and delivered to him prior to October 20th, 1863, and before any lists were issued to or taxes collected by said Clements, as Deputy

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Collector of District No. 4. The defendant averred that said bond was not executed on the 30th of June, as stated in the copy of the same, set forth in the bill, nor until after the 1st day of October, 1863, when the State was re-districted, but the same was executed upon the appointment of Clements as Deputy Collector of District No. 4.

The answer admitted that the bond set forth in said bill is, except the date thereof, of the same tenor and effect as the bond upon which judgment was entered, to restrain the collection of which the said bill of complaint was filed.

The answer further stated that after the said Clements was appointed Deputy Collector of District No. 4, he entered upon the duties of his office, and continued until July 15th, 1865, when he was removed by the defendant, but that no lists had been sent to him for collection after June 30th, 1865, and no collection had been made by him after July 15th, 1865.

The answer then set forth in detail the facts leading to and attending the meeting, in the bill referred to, between this defendant, together with said Clements and the sureties in the several bonds; which facts were averred to be as follows:

On the 9th day of August, 1865, Daniel L. McBride, who was one of the sureties in another bond subsequently given, called upon the defendant to know if Clements was not very much behind in his payments, to which the defendant replied he was; and said McBride went with him to his office, where the defendant showed him his books, balanced as of June 30th, 1865, and showing a balance against Clements of $11,520.57. Upon inquiry by McBride what should be done, the defendant suggested that Clements and all his sureties should meet at the office of the defendant next day, at 1 o'clock P. M., to which McBride assented. On the 10th day of August, 1865, Clements and all his sureties met in the office of the defendant, in Dover, where the accounts of Clements were shown

to him and assented to as correct. Offers were then made by Clements to assign the partnership property of John F. Clements & Co., or portions of it, which offers were not accepted, as they might conflict with the claims of the creditors of the firm. N. B. Smithers, Esq., was sent for to advise in relation to such transfer, and he expressed doubts as to the validity of such transfer as against the creditors of the said firm. It was then suggested by the complainant or James Green, another of the sureties, that judgment should be entered against John F. Clements,and an execution issued thereon to secure what property could be reached. Thereupon, a controversy arose between the sureties as to their respective liabilities; James Green, one of the sureties, suggesting the inquiry whether the bond in which he was a surety was not superseded by another bond subsequently given by Clements, in which Daniel L. McBride was a surety; which latter bond was for the penal sum of $5,000, and with a condition similar to the other; while the said McBride contended that his bond was merely additional, and that before proceedings could be had thereon the other bond must first be exhausted. Mr. Smithers declined to give an opinion on these questions, and, as he was counsel for the defendant, suggested to them to procure other counsel; and accordingly Eli Saulsbury, Esq., was sent for, and expressed the opinion that the taking of the latter bond did not supersede the former bond of $10,000; whereupon the sureties again requested the defendant to enter the bonds respectively against the said John F. Clements and issue execution thereon. The defendant, being willing to relieve the sureties as far as he could out of the effects of Clements, assented to the entry of judgment and the issuing of execution against Clements, but stated that, as the defalcation was larger in amount than the penalty of either of the said bonds, it would be proper for the sureties to agree among themselves as to the amount which should be

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collected on each bond, to which proposition no objection was made by the sureties themselves or by their counsel; and it was agreed by them that the amount to be collected on each bond should be in proportion to the penalty of their respective bonds, with the further understanding between themselves that the question as to the amount they should contribute among themselves should be left to arbitration, and that of the questions which might arise in considering this matter the two questions as to whether the sureties in the bond in the penal sum of $10,000 were liable for any taxes other than those assessed at the rate prescribed by law at the time said bond was executed; and whether the sureties in the bond in the penal sum of $5,000 were liable in a *pro rata* amount with the sureties in the other bonds, or whether the said bond was not taken as additional security merely, and the sureties therein only liable for the amount which remained unpaid after applying the penalty of the first bond, should be specially referred to arbitration. The answer averred that the complainant and his co-sureties were not ignorant of the fact that a large portion of the defalcation of Clements was for taxes and duties other than those assessed at the rates prescribed by law at the time said bond in which complainant was surety was executed, but that the whole matter was discussed at the said conference by the sureties, and the proposition of their exemption from liability on that ground was clearly stated and considered by them and the reference of that matter specially agreed to by them, as between themselves; and the conclusion was definitely arrived at by them that they would agree to the amounts which should be collected by the defendant on the said bonds respectively absolutely, but that as among themselves the matter of contribution and ultimate liability as to one another should be referred. The answer further stated that upon such conclusion being arrived at by the sureties, Mr. N. B. Smithers, at their request, ascertained

the amount on the bond in the penal sum of $10,000 to be the sum of $7,680.38, and on the bond in the penal sum of $5,000 the amount to be $3,840.19, which amounts the defendant was proceeding to enter on the back of the bonds, when one of the sureties in the $10,000 bond, and, as the defendant believes, Thomas Pickering, declared his intention not to sign the agreement to refer to arbitration; whereupon Daniel L. McBride declared that he would not sign the indorsement on the bond. After Pickering, Green and Smith had returned from an interview between themselves in another room Pickering expressed his willingness to sign the agreement to refer to arbitration, whereupon the defendant, at the request of Pickering, wrote on the bond for $5,000 the following:

"Aug. 10, 1865. We agree that the true amount due "upon this bond is the sum of three thousand eight hun- "dred and forty dollars and nineteen cents, with in- "terest from June 30th, 1865. Witness our hands and "seals.

"Witness:	"JOHN F. CLEMENTS,	[L. S.]
"N. B. SMITHERS.	"DANIEL L. McBRIDE,	[L. S.]
	"JOSHUA R. CLEMENTS;"	[L. S.]

and on the bond in the sum of $10,000 the following:

"Aug. 10, 1865. We agree that the true amount due "on this bond is the sum of seven thousand six hun- "dred and eighty dollars and thirty-eight cents, with in- "terest from June 30th, 1865. Witness our hands and "seals.

"Witness:	"JOHN F. CLEMENTS,	[L. S.]
"N. B. SMITHERS,	"JOSHUA R. CLEMENTS,	[L. S.]
"ELI SAULSBURY.	"WILLIAM SMITH,	[L. S.]
	"JAMES GREEN,	[L. S.]
	"THOMAS PICKERING;"	[L. S.]

which agreements were duly stamped, and signed and sealed by the obligors in the respective bonds. When the agreement had been signed and sealed on the back of

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the bonds as aforesaid Mr. Smithers, with the consent of all the sureties, and, as the defendant believes, at the express request of Thomas Pickering, wrote for the sureties an agreement to refer to arbitration, which is fully set forth in the answer, and, which agreement, after reciting the execution of the bonds aforesaid, the purposes for which they had been given, the default of Clements, the indorsements on the bonds, the purpose thereof, and the different questions which had arisen between the sureties themselves, whether the bond in $10,000 was only liable for the collection and payment of taxes at the rate prescribed by law at the time said bond was executed, and whether the bond in $5,000 was not additional merely, and not liable until the whole amount of the first bond was exhausted, referred these and all other questions arising between themselves to Messrs. Smithers and Saulsbury, with power in them, in case of disagreement, to call in a third person—which agreement was duly stamped, signed and sealed by all the sureties in both bonds.

The answer denied that there was any concealment, fraud or pretense on the part of defendant to induce said sureties, or any of them, to agree to or sign the said agreement indorsed on the bonds, but the same was their own understanding and voluntary action, the defendant all the time expressing himself perfectly satisfied with his position, and only acting according to the wishes of the said sureties, but stating that unless they did sign said indorsements he should enter the bonds against the sureties and then rest—to which course they objected.

The answer admitted the entry of judgment and the issuing of execution against John F. Clements, but averred that the same was done at the express desire and earnest solicitation of the said sureties, and with the approbation of Clements.

The answer denied that Clements ever informed the defendant that he was unwilling to retain the office of Deputy

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Collector; and further particularly denied that the defendant ever, directly or indirectly, consented, assented or agreed to the use of the money collected by said Clements, by him or the firm of John F. Clements & Co., or by any other person, for any purpose whatsoever, but averred that the defendant was persistent in his efforts to procure from Clements the payment of the taxes committed to him for collection; and further averred that whenever Clements spoke to the defendant about the small profits of his office the defendant expressed his willingness to accept his resignation, and on one occasion sent his brother to see Clements and endeavor to procure his voluntary resignation.

The answer further stated that the defendant made no communication to the sureties of any arrangement for the use of the money, because no such arrangement was ever made; but, on the contrary, that every charge, matter and information by which the existence of any such arrangement or understanding is asserted or alleged in the bill of complaint is utterly untrue.

The answer averred that the defendant had no knowledge or suspicion that the money was so used until about February 1st, 1865, when the books having been balanced, as of January 1st, 1865, the defendant found Clements in arrear to a large amount, mentioned in the answer, and thereupon the defendant sent a statement of the account to Clements, with a peremptory letter for payment; that after a few days, and about February 1st, 1865, Clements called upon the defendant and told him that he could not pay, that his funds were locked up in grain, and that navigation had closed, but that as soon as navigation opened and he could get his vessel to New York he would pay. The defendant then reproved Clements for the use of the money,and Clements admitted that he ought not to have so used the money. In a subsequent conversation,while the defendant was animadverting upon the use of the money in

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the presence of John H. Bateman, Clements admitted that he ought not to have used it, and said that if he ever got out of this scrape he would never be caught in another.

The answer, after making some other statements not necessary to be here mentioned, denied that the defendant ever had any such conversation with the complainant as stated in the bill; averred that the only conversation he had with the complainant prior to the conference on the 10th of August, 1865, relative to Clements, was before the 7th day of June, 1865, when the complainant met the defendant on the street in Dover, about the 1st and before the 7th day of June, 1865, and asked him if Clements was up with his payments, to which the defendant replied, he was not, but he had promised to return his lists and make his accounts good by the 15th day of June. The answer further averred that none of the sureties asked the defendant or his clerk relative to the state of accounts of said Clements prior to August 10th, 1865, or had any conversation in reference thereto with the defendant, except the one above mentioned of the complainant, and the one above stated with McBride. The answer then set forth a statement of the indebtedness of Clements on March 31st, 1865, which was stated to be $18,044,46.

The answer, after some further averments, stated that the defendant refrained from entering the bonds against the sureties until he was informed by J. P. Comegys, Esq., their counsel, that they intended to resist the payment thereof; whereupon, the defendant caused judgment to be entered severally against the the sureties, and caused execution to be issued against the complainant and against Daniel L. McBride, and was proceeding to collect the same when he was stayed by the injunction of this Court.

The answer denied that any of the monies collected on lists which were issued to Clements subsequent to the execution of the bond in the sum of $10,000 was taken or applied to any indebtedness of Clements which was in-

curred prior to the making of said bond, and set forth a statement of the manner in which the payments were made.

It also denied that the account of Clements was entitled to any credits other than those which were given at the time of the ascertainment of the balance aforesaid of $11,520.57; and it specially denied that the two checks mentioned in said bill were applicable to the accounts of said Clements as Deputy Collector. The answer stated the circumstances under which said checks were given, one to pay a note in favor of William L. Hansell & Co., of Philadelphia, which had been sent to N. B. Smithers, Esq., for collection; the other to pay money which had been borrowed by Clements of the defendant.

The answer averred that the aforesaid balance, instead of being diminished, ought to be increased by the sum of $790, less $277.82, commissions, which sum had actually been received by Clements but had never been returned by him, and which amount was discovered by the defendant after the ascertainment of the aforesaid balance.

The answer admitted that the several drafts mentioned in the bill were drawn as therein stated, and that the defendant received the amount thereof and credited the same to the account of said Clements; and further stated that such drafts were an accommodation to the defendant in his business, and set forth an account of his mode of business: that said Clements, when about to make any payments to the defendant, would usually ask him whether he preferred the money or a draft, and that the defendant would reply to him that he preferred a draft.

The answer further stated that of the lists delivered to Clements for collection, the sum of $2,010.60 was assessed on the manufacturers of sorghum molasses, of which $258.41 was assessed prior to June 30th, 1864, and the residue of $1,752.20 was assessed subsequently; of which latter amount the sum of $21.42 was abated to the manu-

Statement of the case—answer.

facturer, and the whole of said sum of $2,010.60, except the amount abated to the manufacturer, was received by Clements; and that no tax on sorghum, manufactured after March 3d, 1865, was placed in his hands. The answer insisted that the defendant had authority by law to collect the tax on sorghum, and that he was directed to collect the same by a letter of instruction from the Commissioner of Internal Revenue, which letter was made part of the answer.

The answer admitted the passage of certain acts of Congress in the bill mentioned, making changes and alterations in the rates of taxes after the execution of the bond in $10,000; but it insisted that the sureties in the bond were not thereby released. It also admitted that the defendant had not, since the passage of the act of Congress, approved June 30th, 1864, been re-appointed by the President; nor had, since the passage of said act, given a new bond; but it insisted that neither such re-appointment nor the giving of a new bond was necessary.

The answer set forth a statement of the lists of taxes delivered to Clements for collection, and a statement of the duplicate returns which had been returned by him during his entire term of office as Deputy Collector. It also set forth some specific sums of money which Clements had received, but of which the defendant was ignorant at the time of the ascertainment of the balances indorsed upon the bonds.

There were annexed to the answer, and made a part of the same, sworn copies of the accounts of the defendant. It was agreed between the solicitors of the respective parties, among other things, that the agreement of the sureties to refer to arbitration was correctly set forth in the answer, and that the bonds and the indorsements thereon were also correctly set forth.

The cause came before Edward Ridgely, Esq., Chancellor *ad litem*, (the Chancellor having been of counsel for the de-

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fendant before his appointment to office) and was argued at great length on the 6th, 7th, 8th, 9th, 12th, and 13th days of February, 1867.

J. P. Comegys and *E. Saulsbury*, for the complainant.

N. B. Smithers, for the defendant.

RIDGELY, CHANCELLOR, *ad litem*.—The first question presented to the Court for its decision in this case is, whether Charles H. B. Day, the defendant, consented to the use of the money collected by Clements as Deputy Collector, by the said Clements, or the firm of John F. Clements & Co., in their business of grain buying and speculating, as charged in the bill of complaint. For if such was the fact, it was a wrongful act of the defendant not communicated to, or assented to, by the sureties of Clements, and the consequences of such wrongful act of the defendant must and ought to fall upon the party committing it. Is such consent of the defendant to the use of the public money proved in this case? The allegations in the bill on this point are founded solely on information communicated to the complainant and his co-sureties by J. F. Clements after the 10th day of August, 1865, the day of the conference at Day's office, in Dover, if we except the fact that many of Clement's payments to the defendant were made by drafts, drawn by J. F. Clements & Co., on their factors in New York and Philadelphia, to whom they had consigned grain, which is alleged in the bill to be corroborative evidence of the truth of the information furnished by Clements. The answer persistently and unequivocally denies any such consent by the defendant. The answer is clearly responsive as to this point, and, to quote from an authority cited by one of the solicitors for the complainant while discussing the question now under consid-

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eration, 3*d Greenleaf on Evidence, Sec.* 289, "An answer "which is responsive to the allegations, and charges made "in the bill, and contains clear and positive denials thereof, "must prevail unless it is overcome by the testimony of "two witnesses to the substantial fact, or at least by one "witness and other attendant circumstances, which sup- "ply the want of another witness, and thus destroy the "statements of the answer, or demonstrate its incredibil- "ity or insufficiency as evidence." This being the rule laid down by approved writers on the subject, it becomes essential to consider whether there is any evidence in this case to overcome the answer on this point. The only witness adduced by the complainant to sustain the allegation in the bill, as to the consent of the defendant to the use of the public money is John F. Clements himself. His language on this point is as follows: "I do not recol- "lect what reply Mr. Day made, but I know that he didn't "object; my impression is that he gave his consent; I "feel very sure Mr. Day did give his consent that I should "use the public money in my business, as I do not know "Mr. Prouse's name was mentioned, but Mr. Day knew "we were in business together. He did give his consent "on the occasion of Mrs. Wilson's funeral." It is not necessary here to comment on the vagueness of the testimony of Clements in this particular, nor on the hesitancy with which he speaks of the consent of the defendant to the use of the public money.

For the sake of the argument, let it be admitted that the testimony of Clements is positive and direct as to the consent of the defendant. How is his testimony on this point to be reconciled with the testimony of John H. Bateman, a witness for the defendant, in which Mr. Bateman testifies that he was present at a conversation between the defendant and Clements, in which Clements, among other things, told Day that "if navigation had not closed he

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"would have had funds sufficient to pay all his dues as "Deputy Collector, and that he (Day) would not have "known anything about it,"—referring to the use of the money? This conversation, says Mr. Bateman, occurred at Day's office, in Dover, about the latter part of January or the first part of February, 1865, which is long after the time when Clements says Day consented to the use of the public money. If Clements' testimony is to be credited, how is it that Day would not have known of the use of the money when he had long before given his consent thereto? But let us go still farther and admit, for the sake of the argument, that Bateman is mistaken and ought not to be credited, and that the testimony of Clements stands in no wise discredited, weakened or impaired. Is the fact that many of the payments made by Clements to Day were by drafts of John F. Clements & Co., drawn on their consignees in Philadelphia and New York, such an attendant or corroborating circumstance as, connected with the testimony of Clements, should overcome the positive and direct denial of the defendant in his answer? I think not. The defendant, in his answer, states that his usual mode of doing business was, that he would go to the Farmers Bank and request of them a check on the Philadelphia Bank; and when he arrived in the city he would draw the money on this check from the Philadelphia Bank and pay the same over to the proper government officer; and J. P. Wild, the Cashier of the Farmers Bank at Dover, in his deposition in this case taken on the part of the defendant, corroborates the answer in this particular.

A draft on a Philadelphia or New York commission merchant, in good standing, answered the purposes of the defendant as well as a check on a Philadelphia bank. Mr. Clements was in the grain business before and at the time of his appointment as Deputy Collector, and this was

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known to the defendant; and, being in the business of buying and speculating in grain, it is natural that he or the firm should have, from time to time, funds in the hands of their consignees, realized from the sale of the grain consigned to them; and as the drafts were more convenient to the defendant than the money, and therefore preferred by him, while, at the same time, the taking of them by the defendant as cash enabled the firm of John F. Clements & Co. to draw from their consignees the proceeds of their grain, and thus have the funds in their own hands for use, it was not at all strange that many of the payments were by drafts. In fact, it was a mutual accommodation to both parties, and from it no thought, or even suspicion, would necessarily or probably have arisen in the mind of the defendant that the public money was being used by Clements, or the firm of John F. Clements & Co., in their business. Upon the whole, therefore, applying the rule above quoted, taking into consideration the testimony of Clements on this point, vague and loose as it is, and, to say the least, weakened by the testimony of Bateman, and unsupported by any attendant circumstances that would have naturally created in the mind of the defendant a suspicion of the use of the public money, I am of the opinion that it has not been proved in this case that the defendant consented to the use of the public money by J. F. Clements or John F. Clements & Co., or that he knew of such use until about the first part of February or the latter part of January, A. D. 1865.

Having disposed of that question, we will now consider whether the amount, as shown by the books of the defendant to be due from Clements to the defendant on the 10th day of August, A. D. 1865, was entitled to any credits for payments which had been made by Clements to the defendant, and which were not, but ought to have been credited. It is alleged and charged in the bill that two

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checks on the Farmers Bank, at Dover, one dated April 29th, 1864, for $225.62, the other dated February 7th, 1865, for $2,000, drawn by John F. Clements & Co., in favor of defendant, were payments made by Clements as Deputy Collector, and ought to have been credited to his account as such Deputy Collector. The answer denies that either of these checks was given in payment of any dues from Clements as Deputy Collector; or that his account as Deputy Collector ought to be credited with the amount of said checks, or either of them.

The answer then states the circumstances and purposes for which the checks were given to the defendant; the check of $225.62 being given in payment of a note of William L. Hansel & Co., of Philadelphia, against John F. Clements, which note had been sent to N. B. Smithers, Esq., for collection, but which he, on his departure from Dover, to take his seat as a member of Congress, had left with the defendant to be collected from John F. Clements; and that the check for $2,000 was given to the defendant in payment of money loaned by the defendant to Clements.

It is admitted in the written agreement of the solicitors for both parties, that the check for $225.62 was given to the defendant for the purpose stated in the answer, and no deduction from the amount shown due from Clements, as Deputy Collector, on the 10th day of August, 1865, is now claimed on account of said check. Nothing is admitted by the solicitors in relation to the check for $2,000 above mentioned, and it is for the Court to decide upon the evidence in this cause whether the check for $2,000, dated April 7th, 1865, was a payment made to the defendant by Clements in the course of his business as Deputy Collector, or whether it was a payment made to Day for money by him loaned to John F. Clements. On this point there is but little room to doubt, and nothing is left for conjecture. The answer of the defendant in relation to this matter, is direct and positive, and is corroborated

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in this particular by the testimony of Matthias Day, of John H. Bateman and William S. Prouse, witnesses in this cause for the defendant. Against them we have the weak belief of John F. Clements that the amount of said check ought to have been credited to his account as Deputy Collector. It is, I think, clearly proved that the check for $2,000 was given to Day in payment of money borrowed of him by Clements, and had no relation to or connection with the business of Clements as Deputy Collector.

I am, therefore, of opinion that the checks referred to ought not to be credited on the account of the defendant against Clements as Deputy Collector, and that no deduction from the amount shown due from Clements as Deputy Collector by the books of the defendant on the 10th day of August, 1865, ought to be made for or on account of the money received by the defendant on the said two checks, or either of them.

We are next brought to consider whether the complainant and his co-sureties are properly chargeable for any moneys collected by said Clements, as Deputy Collector, on taxes against the manufacturers of molasses from sorghum, and whether the amount shown due from Clements, as Deputy Collector, on the 10th day of August, 1865, ought to be abated or diminished by the amount admitted by the defendant in his answer to have been collected by Clements on taxes against the manufacturers of molasses from sorghum. This raises the question whether the defendant, as the Collector of Internal Revenue for the District of Delaware or John F. Clements, as his Deputy Collector, had any authority by law to collect any tax assessed on the manufacture of molasses from sorghum? The bill alleges that neither the defendant nor his Deputy Collector had any lawful authority to collect such tax, while the answer avers that the defendant and his Deputy Collector had such lawful authority.

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In the discussion of this question at the bar the arguments of the solicitors for the complainant were confined to the construction of the act of Congress entitled, "An Act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864; and we will now examine said act to ascertain whether, under the provisions therein contained, any tax is imposed on the manufacturers of molasses from sorghum.

By Section 94 of the act aforesaid it is provided: "That "upon the articles, goods, wares, and merchandise here- "inafter mentioned, except where otherwise provided, "which shall be produced and sold, or be manufactured "and sold, or be consumed or used by the manufacturer "or producer thereof, or removed for consumption or "for delivery to others than agents of the manufacturer "or producer within the United States or Territories the "of, there shall be levied, collected and paid the following "duties, to be paid by the producer or manufacturer there- "of, that is to say,"—then follows the enumeration of certain articles, goods, wares and merchandise, and among others is, "molasses, produced from the sugar cane," and not from sorghum or imphee, "a duty of five cents per gallon."

It is evident from the language here used that molasses made from sorghum or imphee is not subject to the specific duty of five cents per gallon; for it is, by positive words, expressly excepted from the duty of five cents per gallon; nor is molasses made from sorghum or imphee expressly, by words, taxed in the act. In a subsequent part of the same section occur these words: "On all manufac- "tures of cotton, wool, silk, worsted, flax, hemp, jute, in- "dia rubber, gutta-percha, wood, willow, glass, pottery- "ware, leather, paper, iron, steel, lead, tin, copper, zinc, "brass, gold, silver, horn, ivory, bone, bristles, wholly or "in part, or of other *materials*, not in this act otherwise

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"provided for, a duty of five per centum *ad valorem*." Section 96 of the same act specifies and enumerates articles which are exempted from tax; and in this section, molasses made from sorghum or imphee, is not mentioned; and it is, I think, clear that by this section such molasses is not exempted from duty. It is now for us to ascertain whether, from a fair construction and interpretation of the words last above quoted from Section 94, a duty of five per centum *ad valorem* is thereby imposed on molasses made from sorghum or imphee. Is sorghum a "material"? and is molasses made from sorghum a manufacture thereof? That these questions can admit of no other but an affirmative answer is, I think, beyond all doubt. Then is such molasses otherwise provided for in said act?—for if it is, it is not subject to the *ad valorem* tax of five per centum. From a careful examination of the provisions of the act relative to the matter now before us, I am forced to the conclusion that such molasses is not otherwise provided for in said act. It would be strange and unnatural to say that the clause imposing a tax of five cents on the gallon on molasses not manufactured from sorghum or imphee was a provision for molasses manufactured from sorghum; yet to such a point we are necessarily brought if we say that molasses manufactured from sorghum is not included in the words last above quoted from Section 94, and is not subject to the *ad valorem* duty of five per centum.

To this I cannot assent; and as molasses made from sorghum is not exempted from tax by Section 96, or any other section of said act, I am of opinion that under the provisions of the act of Congress aforesaid, approved June 30th, 1864, molasses manufactured from sorghum or imphee is subject to a tax of five per centum *ad valorem*.

In this opinion I am strengthened by acts of Congress passed since June 30th, 1864; one approved March 3d, 1865, in which, by the first section thereof, Section 96 of

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the act of June 30th, 1864, is amended by inserting after the words, "concentrated milk," the words, "cider, and "cider-vinegar, and sugar, or molasses made from other "articles than the sugar cane," thereby exempting molasses made from sorghum or imphee; and the other, approved July 13th, 1866, in which, by Section 91 of said last mentioned act, sugar, molasses, or syrup, made from beets, corn, sugar-maple, or from sorghum or imphee, are exempted from all tax. If the Congress of the United States had, at the time of the passage of the act of June 30th, 1864, intended to exempt molasses made from sorghum from any tax or duty, is it not reasonable to presume that they would have done so by the same expression, or expressions of a similar import as those employed for that purpose in the acts of Congress last above referred to? It will not do to say that the subject was not in the contemplation of Congress at the time of the passage of the act of June 30th, 1864; for, in said act molasses made from sorghum or imphee is expressly excepted from the specific duty of five cents on the gallon by said act imposed on other molasses, thus conclusively showing that the matter of molasses produced from sorghum or imphee was expressly considered before and at the time when the act was passed.

The answer of the defendant in this case denies that any tax was collected from the manufacturers of molasses from sorghum after the passage of the act of March 3d, 1865; and, as we have no proof on this point to the contrary, I am of the opinion that the tax collected by John F. Clements, as the Deputy Collector of the defendant, from the manufacterers of molasses from sorghum was collected under the authority of law, and that the amount shown by the books of the defendant to be due from Clements on the 10th day of August, 1865, ought not to be lessened or diminished for or on account of any money collected by Clements, as Deputy Collector, from the manufacturers of molasses produced from sorghum.

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I am also of the opinion that the said amount shown to be due on the said 10th day of August, 1865, ought not to be lessened or diminished on account of any money which may have been due from said Clements while he was the Deputy Collector of Division No. 9, and before the execution of the bond in the penal sum of $10,000, which is admitted by the answer to have been executed and delivered to the defendant between the 1st and 20th days of October, 1863; because it is clearly manifest, as I think, from the answer of the defendant, and from the testimony of Clements himself, a witness of the complainant, that all the money which was due from Clements, as Deputy Collector of Division No. 9, and before the 1st day of October, 1863, was subsequently paid by him to the defendant, out of taxes collected properly applicable thereto, and that no part or share of the balance shown to be due from Clements as Deputy Collector on the said 10th day of August, 1865, had any connection with or relation to any money that may have been due from said Clements, as Deputy Collector of Division No. 9, and prior to October 1st, 1863.

We are now brought to the consideration of the agreement entered on the back of the bond in the penal sum of $10,000, in which the complainant is one of the sureties, and the effect of such agreement; and in the consideration of this question the principles of law as to the appropriation of payments will necessarily be involved. The agreement is in the following words, viz: "August 10th, 1865. We agree that the true amount due on this "bond is the sum of seven thousand six hundred and "eighty dollars and thirty-eight cents, with interest from June 30th, 1865. Witness our hands and seals."

This agreement was signed and sealed by John F. Clements, the principal in said bond, and by each of the sureties therein named, in the presence of N. B. Smithers, Esq. the subscribing witness thereto, and the formal execution

thereof is admitted. What are the circumstances that surrounded and attended the signing and sealing of the agreement?

It appears that upon the suggestion of the defendant, made to Daniel L. McBride, one of the sureties in the bond in the penal sum of five thousand dollars, on the ninth day of August, 1865, John F. Clements and all his sureties in each of the bonds on the 10th day of August, 1865, met in the office of the defendant, in Dover, about one o'clock in the afternoon of that day. The accounts of the defendant with said Clements, as Deputy Collector, which had been balanced, as of June 30th, 1865, were shown to Clements, and assented to by him as correct. The balance then shown to be due from Clements,as Deputy Collector, was the sum of eleven thousand five hundred and twenty dollars and fifty-seven cents, with interest from June 30th, 1865. Clements, being asked by one of the sureties what he proposed to do, replied that he was broken and could not pay; and he then offered to the defendant a bill of sale, signed by himself and partner, for three-fourths of a certain vessel,being their interest therein, for the consideration of $1,800. He also proposed to assign to the defendant certain other partnership effects. A discussion arose between the defendant and the sureties relative to these proposed transfers. Mr. Smithers was sent for, who came and expressed doubts as to the validity of the assignment of the partnership property as against the creditors of the firm of John F. Clements & Co. The sureties urged the defendant to enter the bonds against John F. Clements and issue execution, so as to secure for their benefit all that might be realized from the individual property of Clements before his other creditors had learned of his failure. The defendant remarked that as the amount then due from Clements, as Deputy Collector, was larger than the penalty of either of the bonds it was necessary that they should agree among themselves what

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amount should be collected on each of the bonds; and if they did not among themselves agree to the amount to be collected on each bond he would enter the bonds severally against the sureties and rest; and that he felt perfectly satisfied with the bonds which he had. The sureties objected to the entry of the bonds against themselves, as by such a proceeding the failure of Clements would be made known, and other creditors would seize upon the property of Clements; and injury to them, without any advantage, must be the necessary result of such a proceeding on the part of the defendant. A controversy then arose between the sureties on the respective bonds as to their liability thereon—the sureties in the bond in the penal sum of $10,000 contending that they were released from all liability thereon by the defendant having taken the subsequent bond in the penal sum of $5,000; while the sureties in the latter bond contended that their bond was additional only, and their liability therein did not begin until the whole penalty in the other bond had been applied to the indebtedness of Clements. Mr. Smithers was applied to, but declined to express an opinion on these questions, as he was counsel for the defendant. One of the sureties then went for other counsel, and soon returned with Eli Saulsbury Esq. who expressed the opinion that the taking by the defendant of the subsequent bond, in the penal sum of $5,000, did not release the sureties on the bond in the penal sum of $10,000, and Mr. Smithers concurred in this opinion.

Another question then arose, namely, whether the bond in which the complainant was a surety was security for any other taxes collected by Clements than those which were assessed according to the rates prescribed by law existing at the time of the execution of that bond.

It does not appear, from any evidence in this case, that either Mr. Smithers or Mr. Saulsbury was, at that time, consulted professionally relative to this matter; but it

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seems, from the testimony of Mr. Green, that this point was suggested by Mr. Saulsbury. After further discussion and controversy between the sureties, (the defendant all the time expressing his determination not to execute the bonds against John F. Clements unless the sureties would, as between themselves, agree to the amount to be collected on each of the bonds,) it was agreed that the amount to be collected on each bond should be in proportion to the penalty thereof, and that all questions between the sureties themselves on the respective bonds, as to their liability thereon, and the amount which, as between themselves, they should respectively contribute, should be referred to Messrs. N. B. Smithers and Eli Saulsbury for amicable adjustment, with power in them, in case of disagreement, to call in a third person. In accordance with this understanding, the entry was indorsed on the bonds, and signed and sealed by the respective obligors therein, and the agreement to refer to arbitration was drawn by Mr. Smithers, executed by all the sureties, and handed to Mr. Saulsbury for safe keeping. After this, the parties, who had been together from six to eight hours, left the office of the defendant.

Such being the circumstances immediately connected with the execution of the agreement indorsed on the bonds and of the agreement to refer all matters of difference between the sureties themselves to arbitration, let us consider whether there was any consideration for the agreement indorsed on the bond in the penal sum of $10,000, or, in other words, whether there was anything due from John F. Clements, as Deputy Collector of Division No. 4, under the bond in the penal sum of $10,000. It was contended by the solicitor for the complainant that the bond in the penal sum of $10,000, in which the complainant was a surety, and which was executed sometime in the month of October, 1863, was security for the faithful execution by Clements of the duties of his office of Deputy Collector, and for the payment by him of all taxes by him collected,

which were assessed according to the rates prescribed by law in force and operative at the time the bond was executed, and that the complainant and his co-sureties cannot be held liable, under the bond, for any taxes which might have been collected by Clements, and which were assessed at rates prescribed by laws enacted since the execution of that bond.

The solicitor for the defendant admitted, for the sake of this case, such to be the law.

In considering the case, therefore, I shall do so on the hypothesis that the principle of law, as above stated by the solicitor for the complainant and assented to in this case by the solicitor for the defendant, is correct, and I shall assume such to be the settled law. It was further contended in the argument for the complainant, that as the bond in which the complainant was a surety was only liable for the taxes which were assessed at the rates prescribed by the act of Congress, approved July 1st, 1862, and not for any taxes which were assessed at rates prescribed by any law passed since October, 1863, and as Clements had made several payments to the defendant which neither he nor the defendant had appropriated, the law would apply these several payments of Clements in discharge of the lists of taxes which were first delivered to him for collection, after his appointment as Deputy Collector of Division No. 4; and as all the payments made by Clements since October, 1863, are equal, if not in excess of the amount of the lists of the taxes assessed at the rates prescribed by the act of Congress, approved July 1st, 1862, nothing remained due from Clements on the bond in which the complainant was a surety, and consequently there was no basis or consideration for the agreement indorsed on this bond.

The general rule of law as to the appropriation of payments is, that the debtor has the right, if he pleases, to make the appropriation; if he omits it the creditor may make it; if both omit, the law will apply the payments

according to its own notions of justice; and, in cases of long and running accounts, where debts and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, payments ought to be applied to extinguish the debts according to the priority of time, so that the credits are to be deemed payments *pro tanto* of the debts antecedently due. *United States, vs. Kirkpatrick and others, 9th Wheaton,* 720.

This general rule, however, like most general rules, is subject to exceptions. In my opinion the present case is an exception to the general rule; and the rule above quoted is not, I think, applicable to the case before us. In the case of *Stone vs. Seymour and Bourk, 15th Wendall,* 19, decided by the Court of Errors of the State of New York, the doctrine as to the appropriation of payments was very much considered and discussed by the Court; and it was held in that case, that where payments were made by a Collector of tolls, after a new bond, with new sureties, was given by him, and there were no directions to appropriate, or circumstances from which an intention on the part of the Collector to appropriate such payments to any particular items of indebtedness could be inferred, and the moneys, when received by the accounting officer, were placed generally to the credit of the Collector, on the general account kept with him, the sureties in the first bond were not entitled to credit for the payments made subsequent to the execution of the second bond—the new sureties being entitled to the benefit of such payments to countervail the claims existing against the Collector for moneys received by him as tolls after the accruing of their liability. In the case of *The United States vs. January and Patterson, 7th Cranch,* 572, it was held that where the receiver is a public officer, not interested in the event of the suit, and who receives on account of the United States; where the payments are discriminately made; and where different sureties, under distinct obligations, are interest-

ed, it will be generally admitted that moneys arising due and collected subsequently to the execution of the second bond cannot be applied to the discharge of the first bond without manifest injury to the sureties in the second bond, and, *vice versa*. Justice between the different sureties can only be done by reference to the Collector's books.

In that case the Supervisor had kept one account only against the Collector, and the Supervisor had promised the sureties in the first bond to apply the payments made by the Collector to the first bond, and if all the payments made by the Collector had been so applied, the first bond would have been discharged; yet the Court held that such promise of the Supervisor did not bind the United States,and the Court would not apply the payments made after the execution of the second bond to the first in discharge thereof.

In the case of *The United States vs. Eckford's executors*, 1*st Howard*, 250; and in the case of *Jones vs. The United States*, 7*th Howard*, 681, the rule laid down by the Court in the case of *The United States vs. January and Patterson* was commented on and reaffirmed; and in the case of *Jones vs. The United States*, above cited, the Supreme Court of the United States used this language: "In instances of official "bonds, executed by the principal, at different times, with "separate and distinct sets of sureties,this Court has settled "the law to be that the responsibility of the separate sets "of sureties must have reference to, and be limited by, the "periods for which they respectively undertake, by their "own contract, and that neither the misfeasance nor non-"feasance of the principal, nor any cause of responsibility "occuring within the period for which one set of sureties "have undertaken, can be transferred to the period for "which alone another set have made themselves answer-"able." Upon sound policy and justice to the different sureties in the two bonds given by Clements to the defendant

in this case, and from adjudicated decisions, I think that in the absence of any application of payments by the parties themselves the law would appropriate the payments from collections of taxes assessed under the provisions of law in force at the time of the execution of the bond in which the complainant was a surety, to *that* bond; and to the bond in which Daniel L. McBride is a surety would apply the payments made from collections of taxes imposed by the provisions of law in force at the date thereof, to wit: October 13th, 1864. And, in the absence of any appropriation by the parties, it would be the duty of this Court to examine into the accounts of the defendant with said Clements, and from the best lights which all the evidence in the case afforded, to apportion the amount of the defalcation of Clements between the two sets of sureties according to the principle announced above. From this duty, however, the Court is relieved in the present case, if the agreements indorsed on the bonds are to remain in force and not be disturbed by this Court.

For, in the view which I take of this matter, the entry indorsed on the bonds is an appropriation of the payments which had been made by Clements, as Deputy Collector, towards each of the bonds, and a division between the two sets of sureties of the amount of the defalcation of Clements, and an ascertainment of the amount for which each set of sureties was liable, so far as the defendant himself was concerned; but as between themselves the proportion which each set was to contribute, with other questions of difference among themselves, was, by an agreement of the sureties entered into at the same time with the indorsements on the bonds, referred to the amicable decision of arbitrators chosen by themselves.

Will this Court now disturb the agreement of the parties entered into on the 10th day of August, 1865, and reapply the payments which have been made by Clements?

Opinion :—validity of indorsements on bonds—no fraud.

An examination into the accounts of the defendant with Clements, as Deputy Collector, and of the several payments made by Clements, will—applying the doctrine now held relative to the appropriation of payments, where there are two or more official bonds with different sets of sureties—show that a breach of the condition of both bonds has been committed, and justice demands that each bond should bear its proportion of the loss. We thus see that there is a basis or consideration for the agreement indorsed on the bonds. Was the agreement indorsed on the bonds illegal in itself? Was it procured by or through the fraud of the defendant?—or was there any ignorance or mistake of facts on the part of the complainant and his co-sureties, which it was necessary or material for them to have known or understood at the time of the indorsement on the bonds? An affirmative answer to either of these questions would call for the interposition of a court of equity in behalf of the party aggrieved. It was not pretended, in the argument, that the indorsement on the bonds contravened any principle of law, or that it was in itself illegal; nor was it contended that there was any *actual* fraud on the part of the defendant; but it was contended that there was, on the part of the defendant, constructive fraud, by his not communicating to the sureties certain facts which were in his possession and unknown to them.

We have already stated briefly the most prominent facts immediately connected with the execution of the agreements on the bonds, as they appear from the evidence in the case. The answer positively denies that there was any fraud, actual or constructive, on the part of the defendant, or that he withheld or misstated any facts within his knowledge, which it was material or essential for the sureties to know or understand before the signing by them of the indorsements on the bonds. What was the cause or inducement which led to the signing of the indorsements?

Opinion :—validity of indorsements on bonds—inducement to them.

The sureties were all anxious that the defendant should enter the bonds against Clements and issue execution immediately, and thus secure all that could be saved to them from the individual property of Clements before his other creditors had learned his pecuniary condition; and they were urgent in their endeavors to get him to do so. The defendant would not consent to this unless the sureties would agree among themselves what proportion of the amount of the defalcation should be collected on each bond; and at the same time he told the sureties that, unless they would agree among themselves to the amount to be collected on each bond, he would enter the bonds severally against all the sureties and there rest. Was there anything improper in this? If the doctrine above laid down as to the appropriation of payments on official bonds, where there are different sets of sureties, be correct, it would have been necessary for the defendant, in case the sureties had not agreed to the amount to be collected on each bond, before he could have issued execution on the judgments obtained on the bonds, to have gone carefully over all the accounts of Clements, as Deputy Collector, from the first of October, 1863, until he was removed, embracing a period of about one year and eight months, and to have apportioned the payments to the bonds according to the principle above stated.

This would necessarily have required some time. The sureties were very anxious to avoid all delay, lest other creditors might seize upon Clements' property in advance of them. It is evident, as I think, that the cause or inducement that influenced the sureties to sign the indorsements on the bonds was, that by so doing the defendant would issue execution against Clements and thus save them whatever amount would be realized from his individual property before his other creditors could have execution against him. It was for the benefit of the sureties alone, and no advantage could have accrued to the defendant

Opinion:
Validity of indorsements on bonds—no ignorance of material facts.

therefrom, unless it be from the time and trouble which he must otherwise have taken to have ascertained the true amount due on each bond.

It was contended, in the argument, that there were facts connected with this case of which the sureties, at the time of the conference in the office of the defendant, August 10th, 1865, were ignorant, and which, had they known, they would not have signed the indorsement on the bonds. But what facts are there, material or essential for them to have known, and which they then did not know or understand? According to the view which I take of this case, the defendant never consented to the use of the public money by Clements, or the firm of John F. Clements & Co., or by any other person; no payments had been made by Clements, as Deputy Collector, which had not been properly credited to his account by the defendant; no payment from collections of taxes, assessed since the execution of the bond in the penal sum of $10,000, had been applied by the defendant in discharge of Clements' liability under the first bond in the penal sum of $15,000, and the tax which had been collected by Clements from the manufacturers of molasses from sorghum was, in my opinion, collected under proper authority of law. It is asserted, however, that the defendant concealed from the complainant the true state of the accounts of Clements, as Deputy Collector, and that such concealment amounts to constructive fraud on the part of the defendant.

The only evidence we have of any application by the complainant to the defendant for information as to the accounts of Clements, is the conversation which is stated in the answer to have occurred in the early part of June, 1865, on the street, in Dover, as the defendant was going to the Farmers Bank. In that conversation I can discover no misstatement or concealment on the part of the defendant.

It is true, the defendant did not inform the complainant

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of the amount Clements was then in arrears; but he was not interrogated as to the amount, nor did the complainant go to the office of the defendant on that occasion, or make any request to see the accounts of Clements. The defendant responded directly to the questions propounded to him by the complainant, and, as far as there is any evidence to show, truthfully. It was maintained in the argument that the sureties, at the time of the signing of the indorsement on the bonds, did not know that the liability under the bonds extended only to the taxes assessed at rates prescribed by the law in force at the time the bonds were respectively executed. This, at best, is a question of law, and not of fact. But the evidence clearly proves that this very matter was discussed by the sureties at the time of the signing of the indorsements, and is one of the questions which, in the agreement entered into by the sureties themselves, is specially referred to Messrs. Eli Saulsbury and Nathaniel B. Smithers for amicable arbitrament.

It is further contended for the complainant that the sureties, on the 10th day of August, 1865, were ignorant that the defendant had not been reappointed to his office, and had not given new bond since the passage of the act of Congress, approved June 30th, 1864, and that Clements had not been reappointed Deputy Collector since the approval of said act.

These questions will be considered hereafter, and all I propose to say at this time relative to these points is that, assuming the law to be settled that the bond in which the complainant is a surety is only liable for the taxes imposed by law as the law existed at the time of the execution of that bond, it was not, in my opinion, essential or material for the complainant or his co-sureties to have known these facts at the time they executed the agreement indorsed on their bond. In 1*st Story's Equity Jur. Section* 157, the author, commenting on the evidence on which a court of

Opinion :—validity of indorsements on bonds—no mistake or concealment.

equity will relieve against contracts, says: "Relief will be granted in the case of written instruments only where there is a plain mistake, clearly made out by satisfactory proof,"—"and it forbids relief wherever the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions."

Is there, in this case, a plain mistake of facts (for it is admitted in the argument that a mistake in law alone will not be sufficient ground to afford relief, and such is the well settled law) on the part of the complainant and his co-sureties clearly made out by proof satisfactory to the Court? I think not.

The parties were together, at the office of the defendant, on the 10th day of August, 1865, from five to seven hours. The books and accounts of the defendant with Clements, as Deputy Collector, were open to the inspection and examination of all concerned; the defendant was present, ready to make any exhibition and explanation of the accounts that might have been required of him. Discussions arose between the sureties as to the extent and amount of their liability under their respective bonds. Eminent counsel were sent for and came, and could have furnished any legal information which the parties might have desired in reference to the matter then before them. These counsel remained until the close of the conference. Clements was present; and, if the answer is to be credited, examined the accounts and assented to them as correct.

No concealment or misrepresentation of any fact was made by the defendant on that occasion, if the evidence before us is to be believed. Will the Court, maturely considering all the facts and circumstances which have been proved in this case, interfere with this agreement, executed on the back of the bond with so much solemnity and after such serious consideration? I think not. Nor, according to the view which I take of this case, will the different sets of sureties in the bond be aggrieved by the

Opinion :—apportionment between bonds justly made.

apportionment which they made on the respective bonds. A careful examination of the accounts of the defendant with John F. Clements, as Deputy Collector, and of the several payments made by said Deputy Collector, at the same time keeping in remembrance the acts of Congress under which the taxes were assessed, so as not to be misled by the dates at which the lists were delivered to Clements, will, I think—applying the different payments according to the rule laid down above, where there are official bonds, with different sets of sureties—show that the apportionment by them of their liability under each bond is not very far different from what this Court would have made in the absence of any agreement between the parties. At the same time that the indorsement on the bonds was signed, an agreement between the sureties themselves was executed for the purpose of correcting among themselves any wrong or injury which might be done to either set of sureties by the execution of the entry on the back of the bonds; and the same eminent counsel who were present at the conference at the office of the defendant were selected by the sureties to decide, as between the sureties themselves, what proportion of the amount of Clements' defalcation should be borne by each set of sureties, as well as all other questions of difference between them.

If, therefore, the amount indorsed on the bond in which the complainant is a surety is larger than it ought to be, the complainant and his co-sureties can call upon the sureties in the bond in which McBride is a surety for contribution; and *vice versa* if the amount indorsed on the bond in which McBride is a surety is more than it ought to be, he and his co-sureties can call upon the complainant and his co-sureties for contribution.

This agreement between the sureties themselves was not only proper but eminently wise and judicious under the circumstances.

In the anxiety and haste of the sureties to have an exe-

Opinion :—apportionment between bonds not to be disturbed.

cution issued against Clements before any of his other creditors had learned of his pecuniary embarrassment, there was neither time nor opportunity to have examined carefully into all the accounts and payments of Clements, and to have ascertained the exact and true amount due on each bond. Therefore, to guard against any act which, as among themselves, might work wrong or injury to the one or the other set of sureties, they entered between themselves into the agreement, stated in the answer, referring their matters of difference to Eli Saulsbury, and N. B. Smithers, Esquires.

The indorsement on the bonds and the agreement to refer to arbitration were one and the same transaction concurrent with and dependent on each other. For it is clearly proved, that if the agreement to refer to arbitration had not been signed by the complainant and his co-sureties, the indorsement on the bond in $5000 would not have been executed by McBride. If the Court is to disturb the indorsements on the bonds, it must also interfere with the agreement of reference; for, as before stated, they form parts of one entire transaction. Such an interposition by the Court would destroy the arrangement made by the different sets of sureties amicably to settle all matters of difference between them arising out of their suretyship. After a careful consideration of the agreement on the bonds and the agreement to refer to arbitration, and of all the facts and circumstances connected therewith, I am of the opinion that this Court ought not to disturb or interfere with either the agreement indorsed on the bonds or the agreement of the sureties to leave their matters of difference to reference for amicable adjustment.

It was contended, however, that the defendant in this case ought to have discharged Clements from his office as Deputy Collector as soon as he learned of the use by Clements of the public money, which, by the answer, is

Opinion :—as to omission of defendant to discharge deputy.

admitted to be about the first of February, 1865. Let us now consider this point. What was the contract of the complainant and his co-sureties? For this we must look to the bond itself. It is not necessary here to set forth the bond in full, but the condition, in substance, is that said Clements shall faithfully collect all rates and taxes which he shall be required to collect, or which may be committed to him for collection, and shall pay over all such taxes at such times and in such manner as said Day shall direct; and further, that he shall in all respects perform the duties of his office of Deputy Collector with fidelity. It will be seen from the condition of the bond that there were three matters for which the complainant and his co-sureties contracted;—1st, that Clements should collect the taxes; 2nd, that he should pay over all such taxes; and 3rd, that he should perform with fidelity all the duties of his office of Deputy Collector. The use of the public money by Clements and his neglect to pay it over when required to do so by the defendant was clearly a breach of the condition of the bond, and against such a breach the complainant and his co-sureties had expressly contracted.

Shall it now be said that, because an act has been committed which the complainant and his co-sureties had given bond should not be done, he and they should be discharged from all liability after the act committed? It was a breach of the condition of the bond that Clements did not pay over the taxes whenever he was required to do so by the defendant; yet it appears by the answer that it frequently happened that Clements did not pay over when he was required to do so.

Would it be pretended that because Clements did not pay at the very first time he was required to pay he should have been discharged from his office by the defendant, and that the sureties are not to be held liable for subsequent misconduct of Clements? If not in the one case, how can it be in the other? The use of the public money by Clem-

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ents in his business was a breach of the condition of his bond, and so was his neglect to pay over his collections when required by the defendant. It is a well settled principle of law that whenever a creditor, without the knowledge and consent of the surety, makes a valid contract with his principal debtor, thereby extending the time for payment, the surety is discharged. And why? Because the surety may well say, "*non in hæc fœdera veni.*" It is also well settled that the mere consent to the delay of payment because the principal debtor had not the ability to pay presently, and without any new consideration, does not discharge the surety (*Sailly vs. Elmore*, 2 *Paige Chancery Reports*, 500; *McLemore vs. Powell and others*, 12 *Wheaton*, 554). If the defendant in this case, when he learned of the use of the public money by Clements had consented or agreed to such improper use, the argument of the solicitor for the complainant on this point might have had force, and it might well have been a question whether the sureties were not discharged. But the evidence is that when the defendant was apprised of the improper use of the money he reproved Clements for such official misconduct, and did so more than once. Besides, there is no proof that the public money was used by Clements in his business, or the business of John F. Clements & Co., after the first of February, 1865. In fact, the presumption is that the public money was not used by Clements after that time; for on the first day of February, 1865, the amount of the indebtedness of Clements, as Deputy Collector, was nearly two thousand dollars larger than the amount he admitted to be due on the 10th day of August, 1865. In the case of *The United States vs. Kirkpatrick and others*, 9 *Wheaton* 720, it was held that where the law requires quarterly or other perodical accounts and settlements, a mere omission to bring suit upon the neglect of the officer or agent to account will not discharge his sureties; and the Court in commenting upon this branch of the case then before

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them, among other things, say: "It is admitted that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature, between private individuals." Such is the clear result of the authorities. In the case of *The United States vs. Vanzandt*, 11 *Wheaton*, 184, it was held that the omission of the proper officer to recall a delinquent paymaster under the injunction of the 4th section of the act of 24th of April, 1816, does not discharge his surety. The provisions of said act required that a paymaster who failed to render his vouchers to the paymaster-general for settlement of his accounts for more than six months after he had received funds should be recalled, and another appointed in his place. In that case the paymaster had failed to render his accounts to the paymaster-general for settlement within the time required, and he had not been recalled, and additional funds had been subsequently placed in his hands; yet it was decided by the Court that his surety was not discharged from any liability which had occurred after his failure to render his vouchers for settlement. If the decision of the Supreme Court of the United States in the case just above cited be correct, and its soundness, so far as I know, has never been questioned, how can the complainant and his co-sureties complain because the defendant did not remove Clements from office as soon as he had learned of the improper use of the money?

There is no provision of law requiring that a Deputy Collector should be removed under such circumstances; nor was it any part of the contract of the complainant and his co-sureties with the defendant. I can discover no wrong or injury done or committed to the complainant and his co-sureties in this case by the continuance of Clements, as Deputy Collector, after the defendant had learned of the use by him of the public money. On the contrary, it seems that the complainant and his co-sureties were benefited by his being continued in office; for, as before stated, the indebtedness of Clements, as Deputy Collector, to the de-

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fendant, was nearly two thousand dollars in excess of the amount agreed to be due from him on the 10th day of August, 1865. Besides, it appears by the answer that Clements was actually removed from office on the 15th day of July, 1865, and that no lists of taxes had been committed to him for collection after June 30th, 1865.

I am of the opinion that the continuance of Clements as Deputy Collector and the delivery to him of new lists of taxes for collection, after the defendant had been apprised of the improper use by Clements of the public money, are not sufficient grounds for the discharge of the complainant and his co-sureties from any of the liability under the aforesaid bond.

I now propose to consider the necessity of the defendant in this case giving new bond after the passage of the act of Congress of June 30th, 1864. I will first premise, however, by stating that, according to the view which I take of this case, and as hereinbefore expressed, I do not think it incumbent on the Court to express an opinion on the question before us in the present case. But as this point was pressed with great force, and argued with much ability by one of the solicitors for the complainant, and as it is a vital point in the case of McBride *vs.* this defendant, in which case I do not propose to give a written opinion, I feel it my duty here to express, in writing, my views in relation thereto. It was contended by the solicitor for the complainant, that Section 173 of the act of Congress of June 30th, 1864, repealed the act of July 1st, 1862, entitled, "An Act to provide internal revenue to support the "Goverment and pay interest on the public debt," under which the defendant was appointed Collector of Internal Revenue for the District of Delaware, except certain portions thereof, which are expressly saved by the repealing section; that the effect of such repeal, except as to the savings, is a complete deletion or wiping out of the act

repealed, as fully to all intents and purposes as if said act had never existed. Of the truth and force of this argument there cannot, I think, be any doubt. But let us see what are the savings in the act of July 1st, 1862, which are excepted from the consequences of the repeal thereof. It is not necessary to enumerate all of them, but only such as bear upon the case before us. We find in Section 173 of the act of June 30th, 1864, among other exceptions, the following: "and, excepting further, all provisions of said act which "create the offices of Commisioner of Internal Revenue, "Assessor, Assistant Assessor, Collector, Deputy Collec- "tor, and Inspector, and provide for the appointment and "qualification of said officers. The same section afterward continues as follows: "*Provided* that all the pro- "visions of said acts shall be in force for levying and col- "lecting all taxes, duties and licenses, properly assessed "or liable to be assessed, or accruing under the provisions "of former acts, or drawbacks the right to which has al- "ready accrued or which may hereafter accrue under said "acts, and for maintaining and continuing liens, fines, "penalties, and forfeitures incurred under and by virtue "thereof," and for "carrying out and completing all pro- "ceedings which have been already commenced, or that "may be commenced, to enforce such fines, penalties, and "forfeitures, all criminal proceedings under said acts, and "for the punishment of crimes of which any party has been "or shall be found guilty. *And provided further*, That no "office created by the said acts and continued by this act "shall be vacated by reason of any provisions herein con- "tained; but the officers heretofore appointed shall con- "tinue to hold the said offices without re-appointment." It will be seen, as I think, clearly by the language above quoted from the repealing section of the act of June 30th, 1864, that the office of Collector of Internal Revenue was continued, and the Collector himself continued in office, and saved from the effect of the repeal of the act July 1st, 1862.

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Indeed, it was admitted in the argument of the solicitor for the complainant, that the defendant in this case was continued in office by the savings aforesaid, and that his re-appointment by the President of the United States after June 30th, 1864 was not necessary. But it was contended that before he could perform any of the duties of his office, or legally continue therein, it was necessary for him to give a new bond, and the argument was founded on the words used in Section 9 of the Act of June 30th, 1864. What does Section 9 say ? "*Be it further enacted*, that before any collector shall enter upon the duties of his office "he shall execute a bond for such amount as shall be pre- "scribed by the Commissioner of Internal Revenue, un- "der the direction of the Secretary of the Treasury, with "not less than five sureties,to be approved by the Solicitor "of the Treasury, conditioned that said collector shall "faithfully perform the duties of his office according to law, "and shall justly and faithfully account for and pay over "to the United States, in compliance with the order or "regulation of the Secretary of the Treasury, all public "monies which may come into his hands or possession; "which bond shall be filed in the office of the First Comp- "troller of the Treasury. And such collector shall, from "this time, renew, stregthen and increase his official bond "as the Secretary of the Treasury may direct, with such "further conditions as the said commissioner shall prescribe."

Was it the intention of Congress, to be gathered from the words last above quoted, to require that every collector who had been continued in office by the saving clauses of Section 173 should give a new bond before he could lawfully perform any of the duties which devolved upon him under the provisions of the Act of June 30th, 1864? The words are that "before any collector shall enter upon the duties of his office, he shall," &c. The words "any collector" certainly are broad, and taken by themselves would

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include collectors continued in office as well as those who were newly appointed; but the other words, "before he enters upon the duties of his office," to my mind have a restraining effect, and limit the words "any collector" to those newly commissioned. How can it be said that a collector who is continued in office and already in enters upon the duties of his office? The defendant in this case entered upon the duties of his office in 1862, and has continued in the discharge thereof up to the present time by virtue of the savings in Section 173 of the Act of June 30, 1864.

The whole argument of the solicitor for the complainant, who pressed this point with so much earnestness upon the Court, was based on the assumption that by the repeal of the act of July 1st, 1862, the defendant was out of his office of Collector, and had to commence anew; and the illustrations referred to by him under the statutes of our own State were cases in which a failure to give bond within the time prescribed were by the terms of the law itself *ipso facto* a forfeiture of office. In the present case, as we have before seen, the office and officer were both continued by the savings aforesaid. In the case of the *Bank of the United States vs. Dandridge*, 12 *Wheaton*, 64, it was held that where a cashier was duly appointed and permitted to act in his office for a long time under the sanction of the directors, it was not necessary that his official bond should be accepted by the Board of Directors as satisfactory according to the terms of the charter in order to enable him to enter legally upon the duties of his office. In that case one of the fundamental articles of the charter required that each cashier or treasurer, before he enter on the duties of his office, should give bond, with two or more sureties, to the satisfaction of the directors, in a sum not less than $50,000, with a condition for his good behavior and the faithful performance of his duties to the corporation. The Supreme Court of the United States say that the

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charter and by-laws of the bank must be considered as directory to the Board of Directors, and not as conditions precedent, and that the cashier could legally discharge the duties of his office without first giving bond, as directed by the fundamental article.

It will be seen that the words in the fundamental article of the bank charter are very similar, and certainly as strong as the language in Section 9 of the act of June 30th, 1864. In the case of *The United States vs. Vanzandt*, heretofore cited on another point, the language of the act of Congress requiring the recall of a paymaster who failed to render his accounts for settlement to the paymaster general within the time prescribed by said act was equally as strong, if not stronger, than the language of said Section 9. Yet the same Court say, that this provision is merely directory to the officer, and intended for the security and protection of the goverment by insuring punctuality and responsibility; but they form no part of the contract with the surety. In the case of *The United States vs. Kirkpatrick*, above cited from 9 *Wheaton*, 720, the same principle is announced by the Court.

I can discern no difference,in principle, between the cases last above cited and the point now under consideration in this case; and from principle and adjudicated decisions of the Supreme Court of the United States and of other States, I think that the provision of Section 9 of the act of Congress of June 30, 1864, are directory only, and not conditions precedent, and.that such provisions were inserted in the said act for the benefit and protection of the Government. A contrary doctrine would place in the hands of the Secretary of the Treasury the power to clog the wheels of the Government and to destroy the whole machinery for the collection of the necessary funds to support the Government and pay the interest on the public debt.

And, although the consequences which might result should never influence a court to decide a case contrary

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to the well established principles of law, yet it will scarcely be pretended that the Congress of the United States intended to place such unlimited powers in the hands of the Secretary of the Treasury, or any other of its officers. At the time of the passage of the Act of June 30th, 1864, there were a large number, some two or three hundred collectors of internal revenue in the country, who were continued in office by the said act; and, if the doctrine of the solicitor for the complainant is correct, none of these officers had any legal authority to collect any tax imposed by said act until they gave new bonds. The amount for which the bond is to be given must be prescribed by the Commissioner of Internal Revenue under the direction of the Secretary of the Treasury. Suppose the Secretary of the Treasury failed or neglected to give any instructions? We have some three hundred collectors in office, but without the authority to collect one cent of the taxes intended for the support of the Government.

I do not think that Congress ever intended to place it in the power of any officer to throw the whole country into such a dilemma; nor do I think that the words of the act itself will sustain the construction given by the complainant's solicitor.

It is to be presumed that the Secretary of the Treasury is acquainted with the duties of his office and with the laws relating thereto; and that if he considered it necessary for the defendant in this case to have given new bond after June 30th, 1864, he would have required one of him.

We know not what the condition of the official bond of the defendant may be; but it was competent for him and his sureties to have contracted for the faithful discharge of the duties of his office under the law as it then existed, and under all future laws that might be enacted by Congress. Such may be the condition of his official bond, and the Secretary of the Treasury may deem it sufficient. But, to lay aside all surmises and presumptions, I am of

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the opinion that, according to the settled principles of law, as I understand them, it was not necessary for the defendant in this case to have given a new bond after the passage of the act of June 30th, 1864, to enable him lawfully to continue in the discharge of the duties of the office of Collector of Internal Revenue for the District of Delaware, and that the sureties of the said John F. Clements on his two aforesaid official bonds as Deputy Collector are not discharged from any liability by reason of the said defendant not giving new bond after the passage of said act of June 30th, 1864.

I have now considered all the questions raised by the bill, answer, and proofs, which were necessary and material to be considered by the Court for a correct decision of this case.

There were other grave points pressed upon the Court by the counsel, upon which I have not deemed it necessary to express an opinion, as I did not consider them material for me to decide upon, according to the view which I have taken of the case.

I have also expressed, as briefly as I could under the circumstances, and I know very imperfectly, some of the principal reasons which have influenced my mind in the conclusions at which I have arrived.

The case was ably argued at the bar, and pressed with much force and earnestness by the solicitors for both parties; and the learning exhibited in the arguments has materially assisted me in my consideration of the subject.

I have felt less embarrassment in deciding the case than I should otherwise have experienced if from my decision there were no appeal; but if the complainant and his cosureties feel themselves aggrieved by the conclusions to which I have arrived, they can seek their redress in another tribunal, where the decisions of this Court may be reviewed, and where the experience, learning and ability of the

judges who there preside will correct any errors into which I may have fallen.

Let the injunction be dissolved, and a decree entered accordingly.

ANNE V. GARDEN, executrix of FRANCIS R. GARDEN, dec'd.

vs.

JACOB DERRICKSON, et al.

New Castle, Nov. Term of Superior Court, 1868.

Before the Chief Justice.

A bond under seal, though voluntary, creates a debt, and is impeachable only for fraud.

Such a bond is enforceable against the grantor, and against all claiming under the grantor as volunteers.

I. G. executed and delivered to her son, F. R. G., a bond for $7,100. Afterward she made voluntary conveyance of her real estate to other children. After her death a judgment upon the bond was recovered against her administrator. *Held*, that in equity the real estate was bound by the judgment, irrespective of the question whether the bond for which it was recovered was voluntary or not.

BILL IN EQUITY, filed under the circumstances following:

Isabella Garden executed and delivered to Francis R. Garden, her son, her bond or obligation under seal, bearing date June 7th, 1858, for $7,100, payable in annual installments of $200 each, with interest; with a provision that at her decease the whole debt should be payable out of her estate. Francis R. Garden died about the year 1861, leaving a

Statement of the case.

will, of which the complainant was executrix. Isabella Garden died in November 1864, intestate; and administration of her estate was granted to the defendant, David P. Derrickson. Judgment in the Superior Court for New Castle County was recovered by the executrix of Francis R. Garden dec'd, against the administrator of Isabella Garden, dec'd, upon the bond to the amount of $8235,65 and costs; said judgment being No. 102 to May T. 1865. A *fieri facias* upon the judgment was issued and a levy made upon certain real estate of which Isabella Garden was seized in her lifetime and at the date of the bond. A portion of the real estate was sold and the net proceeds ($568,51) applied to the execution. Further proceedings at law under the execution were suspended in consequence of the fact that Isabella Garden had, in her lifetime, by sundry deeds conveyed away all her real estate, (being the real estate levied upon,) except the small parcel which was sold as before mentioned. A portion of the real estate was conveyed by deed, dated August 6th, 1862, to her daughter, Mary A. C. Derrickson, in consideration of natural affection and of one dollar: and the residue was conveyed by deed dated August 6th, 1862, for the consideration of one dollar, to Charles B. Lore and William C. Lodge, as trustees for William A. Garden, a son of Isabella Garden, during his lifetime and for his children in fee simple at his decease. William A. Garden has since deceased, and the trustees under the last mentioned deed have conveyed the premises therein described to his children, who are defendants herein.

The bill charged that Isabella Garden was, at the execution of the obligation before mentioned, indebted to Francis R. Garden in the sum therein mentioned; that the conveyances of her real estates were wholly voluntary and without any valuable consideration; and that, being made while the grantor therein was indebted to the complainant's testator, they were void as against such debt; that Isabella Garden had left no personal property or other real estate to satisfy

Statement of the case.

the debt. It, therefore, claimed that the real estate was held by the grantees subject to the judgment; and prayed a decree for an account of any personal estate of Isabella Garden dec'd, and that upon a deficiency of the same, the real estate should stand charged with the judgment, and a sale of the same be decreed and the judgment paid out of the proceeds.

The answer denied that Isabella Garden, at the time of the execution of the bond, was at all indebted to Francis R. Garden. It set forth a detailed state of facts tending to shew that Francis R. Garden was, at the date of the bond, wholly insolvent and could not have been a creditor of Isabella Garden; and it charged that the bond executed by her was wholly without consideration. The answer admitted that the two conveyances of Isabella Garden's real estate were without a valuable consideration; but it insisted that the conveyances of the real estate, though for the consideration of natural affection only, were valid except as against *bona fide* creditors for value of the grantor; and that complainant, being herself a volunteer, had no equity against the grantees of the real estate.

Depositions were taken on the part of the defendants tending to prove the insolvency of Francis R. Garden, at the date of the bond given to him by his mother and the improbability of her being indebted to him. On the part of the complainant letters of Isabella Garden were put in evidence addressed to Francis R. Garden's executrix, containing remittances on account of the bond—also a letter, under date of March 27th, 1860, containing a statement of her indebtedness on the bond and of payments she had made on account of it.

The case came before Hon. Edward W. Gilpin, Chief Justice, sitting as Chancellor,* at the Nov. T., of the Su-

*The case was transmitted from the Court of Chancery, to be heard by the Chief Justice under the Constitution, because the Chancellor was interested in the subject matter of the controversy.

perior Court, 1868, for a hearing upon the bill, answer, exhibits and depositions.

T. F. Bayard, for the complainants.

The bond of Isabella Garden is a perfect legal instrument, imposing upon her estate an ascertained legal obligation, for the payment of $7,100, with interest. This is not denied; but the objection is that the bond being, as defendants claim, voluntary, cannot be enforced against the land conveyed to them in Mrs. Garden's lifetime.

To this we answer:

1. *The bond was not voluntary.* In the first place, the seal imports a consideration. The legal presumption thus raised is confirmed by Mrs. Garden's formal acknowledgment of the debt,in her letter of March 27th, 1860. In addition to this is the effect of the judgment recovered against her administrator, which is conclusive of a consideration for the bond, and is an estoppel,binding not only the principal but also all privies in estate,such as these grantees are. 2 *Smith's Lead. Cas.* 572, 559. The result is that the bond being a debt due and unpaid at the time these conveyances by the debtor were made, and the conveyances being voluntary, they are void as against this creditor under the statute of 13 Elizabeth; and a court of equity will hold the land charged, in the hands of the grantees, with the judgment under the statute which makes all a decedent's lands a fund for the payment of his debts. *Rev. Code. Chap.* 110, *p.* 390; *Chap.* 90, *p.* 310.

2. But suppose the bond *was* voluntary. In that case all the claimants are volunteers; and between equal equities the prior one will prevail. *Prior in tempore potior in jure.* 1 *Shep. Touch*, 65.*n.* Besides, the complainant has the power to enforce her judgment at law; and whoever,in addition to an equity, has the law on his side must prevail. *Adams' Equity* 349, *n; Ellison vs. Ellison* 6. *Ves. Jr.* 656; *Fletcher*

vs. Fletcher, 4 *Hare* 67. 1 *Sto. Eq. Jur. Secs.* 105, 176, 433, *note*, 787, 793.

In this case the complainant holds, in the bond, a perfect legal security,which the law would enforce against Isabella Garden, the obligor,and equally so against all taking under her as volunteers. If necessary, a court of equity will aid in the enforcement of such a bond, as of any other legal security. It is not true that equity will in no case aid a volunteer. It will aid a volunteer having the prior right against volunteers. 1 *Fonb. Eq.* 274, *n.* 345, 6, 7; *Bouton vs. Bouton.* 1 *Atk. R.* 625; *Villiers vs. Beaumont.* 1 *Vern. R.* 100; *Allen vs. Arne*, *ib.* 365; *Beard vs. Nutall*, *ib.* 427; *Clavering vs. Clavering*, 1 *ib.* 473

Bradford and Higgins, for the defendants.

It is not within the intent of the statute of 13 Elizabeth that a volunteer grantee of land should be held a trustee for a volunteer bondholder. Neither under the statute nor at common law can a trust be raised as between volunteers. A party seeking the aid of a court of equity must have a higher right than those whom he seeks to dispossess. In this view there is a broad distinction between creditors for value and persons claiming under a security given without a valuable consideration. The latter, as to third persons, are mere volunteers,whom equity will not aid,even against other volunteers having the legal right. No case can be found in which any but a creditor for value has been aided as against a volunteer. *Twyne's Case.* 1 *Smith's Lead. Cas.* 1; *Taylor vs. Jones.* 2 *Atk.* 600; 1 *Sto. Eq. Jur. Sec.* 433; 2 *ib.* 793, 706; *Colman vs. Sarel*, 3 *Bro. Ch. R.* 12; *Jefferys vs. Jefferys*, 1 *Cr. & Phil. R.* 138, 141; *Price vs. Price*, 8 *Eng. L. & E. R.* 271. *Holloway vs*, *Headington*, 8 *Simon's R.* 325.

Then is this a voluntary bond? To ascertain whether it be so or not a court of equity will look behind the seal, and inquire into all the circumstances. The effect of the

Opinion.

seal is only to impose upon the defendants the *onus* of shewing want of consideration. This they have done by the proof that Francis R. Garden was utterly insolvent when this bond was given, and could not have been her creditor. 1 *Am. Lead. Cas.* 48; *Kekewich vs. Manning*, 12 *Eng. Law & Eq. R.* 126; *Hall vs. Palmer*, 3 *Hare R.* 532; *Ramsen vs. Jackson*, 1 *Atk. R.* 294; *Lomas vs. Wright*, 2 *Myl. & Keene R.* 776; *Clough vs. Lambert*, 10 *Simons R.* 178; *Garrard vs. Lord Dinorben*, 5 *Hare R.* 213.

GILPIN, C. J. Isabella Garden executed and delivered to her son, Francis R. Garden, her bond or obligation, dated June, 7th, 1858, for the payment of $7,100, with interest, the payment of the principal being subject to some special provisions not necessary to be stated. Afterward, by two deeds, she conveyed her real estate, in part to her daughter, Mary A. C. Derrickson in fee simple, and the residue to trustees for the benefit of her son William A. Garden and his children. These conveyances were wholly voluntary, being in consideration only of natural love and affection. Since the death of Mrs. Garden a judgment has been recovered on the bond against her administrator; and such proceedings have been had as are necessary under the statute to make the judgment a lien upon real estate of the decedent. Had she remained seized of the real estate in question until her death it would, without controversy, have been subject to the judgment. The question then is whether her conveyance of the real estate in her lifetime, without any valuable consideration, defeated the judgment. It is not disputed that had the bond on which the judgment was recovered been an ordinary debt, contracted for a valuable consideration, the conveyance of the real estate would, as against such debt be void; or rather the land would stand charged, in the hands of the grantees, with its payment. But it is insisted for the defendants that the bond itself was voluntary and that a court of equity will not aid a volunteer.

Syllabus.

My view of the bond is this. It is a perfect legal instrument under seal; it is not a defective instrument, such as needs the aid of a court of equity to make it perfect. The aid required is the removal of an obstacle to its enforcement presented by the conveyances. The seal imports a consideration; by which is meant not merely that the seal is *prima facie* evidence of a consideration, but that it gives to the instrument, in the absence of fraud, the effect of a bond executed for a consideration. Whether it were given in fact for a consideration or not,it creates a perfect obligation, both at law and in equity, which is enforceable as a debt against the obligor and against all volunteers claiming under her. Such a bond can be impeached only on the ground of fraud.

I am of opinion, therefore, that the real estate remains in the hands of the grantees, charged with the judgment.

A decree was entered for the sale of the real estate and for the payment of the judgment out of the proceeds.

THE STATE OF DELAWARE,

vs.

POTTER GRIFFITH, ET AL.

Kent, March Term, 1847.*

Charitable uses are not within the rule of law against perpetuities.

A devise of real estate, with a direction that the same be not sold but rented—"the proceeds arising from such rents" to be applied to certain charitable uses--*held*, not to be within the law against perpetuities.

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* This case was not found among Chancellor Johns' papers in time to publish it in its proper order.

Syllabus.

Prior to the English Statute of 9 GEO. II, charitable uses in England were subject to no restriction.

The English mortmain acts did not extend to the British colonies.

The Delaware Statute of 17 GEO. II, for the relief of religious societies, &c., considered; its history and objects. The prohibitions in this statute against testamentary gifts of real estate to religious societies do not affect charitable uses generally.

A devise to certain charitable uses of a fund, to be distributed "by agents, to be appointed by the Orphans' Court or the Levy Court of Kent County, as may be deemed most proper," is not void, for uncertainty as to which one of the two Courts shall appoint the agents. Either Court may exercise the power of appointment. If both refuse, this Court will appoint. So, were the power of appointment void for uncertainty, this Court would have power to create the necessary agency.

Distinction between limitations of the legal estate and limitations by way of trust, with respect to the degree of certainty requisite in the objects to take.

A devise of lands in trust "to and for the support, maintenance and education of the poor white citizens of Kent County generally," coupled with a direction that no part of the bequest should "be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof," is not void for uncertainty in the description of the objects.

Uncertainty as to the individual beneficiaries, until appointment or selection, is characteristic of a charitable use.

An equitable interest vests in the beneficiaries of a charitable use, from the time of their appointment or selection—such as entitles them to enforce their equitable rights.

The jurisdiction of the Court of Chancery in this State to protect and enforce charitable uses, considered at large and sustained.

Such jurisdiction, in England, existed in the Court of Chancery prior to the Statute of 43 Elizabeth, and is not founded on that statute.

The cases of *Baptist Association vs. Hart's Ex'rs*, 4 *Wheat S. C. R.* 1, and *Vidal et al. vs. Girard's Ex'rs.*, 2 *How. S. C. Rep.* 127, reviewed.

Statement of the case.

CASE STATED IN EQUITY.—This was an information filed by the Attorney General to establish the trusts of a devise to charitable uses made by the last will and testament of Benjamin Potter, dec'd. The questions arising in the case were submitted to the Chancellor upon a case stated, the material facts of which were as follow:—

Benjamin Potter, being seized of a large estate, real and personal, made his last will and testament, bearing date July 26th, 1839, and also three codicils; No. 1, dated July 26th, 1839, No. 2, dated September 5th, 1843, and No. 3, dated October 12th, 1843. The testator died October 21st, 1843, and probate was duly made of his will and codicils.

By the will and codicils of the testator, taken all together, he devised all the residue of his estate, which included a large real estate situated in Kent County, to Potter Griffith, George S. Adkins and Levin H. Adams, (who were also appointed executors,) in trust, "to be by them, my said executors, rented out and the proceeds arising from such rents to be applied to and for the support, maintenance and education of the poor white citizens of Kent County generally"—the distribution thereof to be made "by agents to be appointed by the Orphans' Court or the Levy Court of Kent County, as may be deemed most proper. I wish it to be clearly understood that no part of my bequest shall be applied to the use or benefit of any person or persons residing within the walls of the Poor House; but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof." *

*The items of the will and codicils, out of which the questions arose, are as follow:

Item 18 *of the Will.*—"I give and bequeath to Potter Griffith, George S. Adkins and Levin H. Adams, all the balance or residue of my estate, real, personal and mixed, of every description, in trust; also all the real

Statement of the case.

The trustees named in the will declined to accept the trust. The defendants, who were the heirs at law of the testator, brought an ejectment for the residuary real estate, claiming that the devise of it to the charitable uses was invalid. Pending this action the present case stated was filed, wherein the State was made a complainant and the heirs at law defendants,as upon an information filed by the Attorney General to restrain the ejectment at law and to establish the trusts of the will.

The questions raised by the case stated were, "whether the said devise, so made in and by the said 18th Item of the said last will and testament and said codicils thereto, unto and for the said charitable uses, objects and purposes in manner and form aforesaid, are valid and capable of being sustained and carried out in a court of chancery, according to the rules and principles of equity; or whether the

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estate which I may purchase or acquire, after the date of this my last will and testament, and after a proper settlement of my estate and sale of all such of my lands as are not devised in former items of this my will; which said lands they may sell and dispose of, at such time or times as they may deem most proper; and all the net proceeds of all my real and personal estate, after paying the legacies given and bequeathed in the former items of my will, to be paid over to my executors, Potter Griffith, George S. Adkins and Levin H. Adams.

I particularly enjoin it on my executors, or the survivors or survivor of them, or agents appointed by them or by the Chancellor of the State of Delaware, to sell,at such times as they may deem most advisable, and to lay out all the net proceeds, as it shall become due, in such stock as they or a majority of them may deem most proper, and to reinvest all such interest or dividends as may arise from said stock, for the full term of five years from the date of the purchase or investment of such stock by my executors; and my will and desire is that all the net proceeds or dividends arising from said stock shall be distributed by my executors in the following manner, to wit: one-third thereof to the trustees of the Methodist Episcopal Church in the town of Milford, Delaware, for the sole use and benefit of the said Methodist Episcopal Church in said town; one other third part thereof to and for the support of the aged and infirm portion of the mechanics residing in the town of Milford, and to assist such young mechanics in setting up or commencing their respective trades, who shall not be able to do so themselves, of their own means; such distribution to be

same are void or illegal and not capable of being sustained and carried out in a court of equity, according to the rules and and principles of equity."

It was agreed by the parties "that in case the Court shall be of opinion and decide that said devises, so made in manner and form aforesaid, are valid and capable of being sustained and carried out in a court of chancery, according to the rules and principles of equity, a decree shall be entered in favor of the complainant in this suit, perpetually enjoining the said defendants, who are lessors of the plaintiff in the said action of ejectment, and that the Court may make such decree or decrees as may be deemed necessary for establishing the trusts and charitable uses of the will and carrying the same into execution. And, further, it was agreed that in case the Court shall be of the opinion and decide that said devises, so made in manner

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made by trustees, to be appointed by a majority of the mechanics at that time living in the town of Milford and their successors, and to be distributed by said trustees at such times and in such sums as they, or a majority of them, may deem most proper. The remaining one-third part thereof to be distributed amongst the poor white citizens of the town of Milford and of Milford Hundred who are not otherwise provided for in any of the preceding items of my will; and this distribution is to be made by agents to be appointed by the Orphans' Court or the Levy Court of Kent County, as may be deemed most proper. I wish it to be clearly understood that no part of my bequest shall be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who, by timely assistance, may be kept from being carried to the Poor House and becoming subjects thereof."

In *Codicil No.* 2, was a provision as follows:—

Fourthly—In item 18th, of my last will and testament aforesaid, I wish to make and do hereby make the following alteration, to wit: I wish and desire that all my real estate, of which I may be possessed at the time of my decease, and which has not been devised or given to individuals in my last will and testament aforesaid, instead of being sold by my executors, as provided in said eighteenth item, shall be by them my said executors rented out, and the proceeds arising from such rents to be applied by my said executors to the same purposes and for the same uses as is mentioned in the three items and under the three heads of distribution, as written in the

Statement of the case.

and form as aforesaid, are not valid, nor capable of being sustained and carried out in a court of chancery, according to the rules and principles of equity, the Chancellor shall decree accordingly.

But, it was further agreed that any of the said parties might appeal from any decree which should be made by the Chancellor in this cause to the Court of Errors and Appeals, and that such appeal or appeals should be heard and decided in the Court of Errors and Appeals upon the case stated.

The cause came before the Chancellor, at the March Term 1847, and was submitted upon the case stated with statements by counsel of points and authorities.

E. W. Gilpin, Attorney General, with whom was *J. P. Comegys*, for the State.

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said eighteenth item, and on the fourth page of my last will and testament aforesaid; it being my intention and meaning hereby to alter and amend said eighteenth item only so far as to enjoin upon my executors aforesaid the renting instead and in the place of the sale of my real estate."

In *Codicil No.* 3, was a provision as follows:—

"*Sixth.*—I hereby cancel, annul and make void all and every part of my last will and testament, and of the codicils thereto, that gives and devises any part or portion of my estate to the trustees of the Methodist Episcopal Church in Milford; and also all and every part thereof that gives and devises any part or portion of my estate to and for the support, use and benefit of the mechanics residing in the town of Milford; and, in the place and stead of such distribution to the Church aforesaid and amongst the mechanics aforesaid, I give and bequeath that portion of my estate that was devised for those two purposes, and also that portion of my estate that was devised to the "poor white citizens of the town of Milford and of Milford Hundred" (hereby annulling and making void this last mentioned item as it stands in the 18th item of my will also) to and for the support, maintenance and education, of the poor white citizens of Kent County generally—the apportionment and distribution thereof to be made in the same manner and under the same restrictions and regulations as are mentioned and written in the 18th item of my last will and testament, to which this present writing is a codicil, concerning the poor white citizens of the town of Milford and of Milford Hundred."

Opinion :—condition of the legal estate.

M. W. Bates, and *D. M. Bates*, for the defendants.

JOHNS, JR., CHANCELLOR.—The question submitted in the case stated respects—*first*, the validity of the devise, and *secondly*, the power of this Court to execute it.

It is admitted to be a devise to charitable uses. The statement of the case does not specifically question the devise as to the quantity or interest of the estate, but regards the invalidity of the devise.

In the points presented the complainant insists that the estate devised in trust is a fee simple in the trustees; and that if the fee did not vest in them, still the whole beneficial interest in the said real estate is devised to charity. The defendants, in their second point, allege that the real estate was devised, as aforesaid, simply to hold and manage the same. I shall, therefore, before considering the general question, advert to this aspect of the case.

The words of the will in the 18th Item, "all the balance or residue of my estate, real, personal and mixed in trust," I have no doubt gave the legal estate in fee. The power to sell was added and the purchase money directed to be invested in order to create a permanent fund, the annual income thereof being appropriated to certain uses. I also consider that the codicil No. 2 revokes the power of sale without disturbing the devise of the legal estate, and annuls the uses declared by the will, substituting, in lieu thereof, a new and distinct object of charitable use, with authority to the trustees to manage the estate and receive the income, to be applied to the charitable use by agents appointed by the Orphans' Court or the Levy Court of Kent County. The testator evidently intended a trust for a charitable use, and has used words which by adjudged cases are sufficient to vest a fee in the trustees. They were persons capable of taking, but have refused the trust. Can their refusal defeat the testator's will or destroy the trust, supposing the

Opinion :—objection on ground of perpetuity.

devise and the trust in all other respects valid? The uniform course and action of a court of chancery, which never allows a trust to fail for want of a trustee, negatives the idea. Therefore, it is immaterial whether the legal estate be in the trustees or descends to the heirs: the trust, being created and incident to it, will be enforced by the Court unless it be invalid from some other cause.

I shall now consider the other causes relied on as rendering the devise invalid.

1. The first is that the testator has designed and attempted to create a perpetuity, and to render said real estate for ever inalienable, contrary to and in violation of the plain rules of law on the subject. The case stated admits the devise in trust to be for a charitable use, which is an estate or interest that does not fall within the scope of the reasoning on which the rule against perpetuities rests. In *Lewis on the Law of Perpetuities p.* 663 (*Law Lib.*,) it is said; "when, either from circumstances extrinsic to a limitation or from the character of its subject matter, a sufficient guarantee exists against any violation of the spirit of the law for the prevention of remoteness, their force and applicability, with respect to any such limitation, cease so far as concerns the necessity for expressly conforming it to the period prescribed by law. This consideration seems to apply to the three following classes of limitations: 1. limitations executory or by way of remainder after or in derogation of estates tail; 2. limitations whose subject matter is of limited endurance; and 3. limitations in mortmain and to charitable uses."

It is apparent that until the Statute of 9 Geo. II, little restraint was imposed on alienations of lands for charitable uses. At that period, as Sir William Blackstone remarks, (2 *Bl. Com.* 263,) it was apprehended that persons on their death beds might make large and improvident dispositions, even for these good purposes, and defeat the political ends

of the statutes of mortmain; and,in the words of Mr. Jarman(1*Jarman on Wills* 198),"it appears to have been considered, that this disposition would be sufficiently counteracted by preventing persons from aliening more of their lands than they chose to part with in their life time; the supposition evidently being that men were in little danger of being perniciously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death."

In England, after the Statute of 9 Geo. II ch. 36, all testamentary charitable provisions out of real estate,or chattels savoring of the realty,were prohibited; and restrictions were imposed on like provisions by instruments *inter vivos*. *Lewis on Perp.* 691; (*Law Lib.*)

The mortmain acts did not extend to the British Colonies; and Sir William Grant says, in *Atty. Gen'l. vs. Stewart*, 2 *Mer.* 164, that, in its causes, objects, provisions, qualifications and exceptions,it is a law wholly English,calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in its effect,of being transferred,as it stands, into the code of any other country.

It thus appears that, anterior to the Statute of 9 Geo. II, ch. 36, a devise of land to charitable uses was not invalid, and was only rendered so by the provisions of that act; and further, that the rule of perpetuity was inapplicable. Regarding, therefore,the law and equity of the case as subject to the common law and principles of equity bearing upon it,in the state of Delaware, unless some legislative act of our own has varied the subject of devises to charitable uses, as has been done in England, the objection to the validity of the devise cannot be sustained on the ground that it creates a perpetuity.

It may be expedient here to notice the only acts of legislation which appear to have any bearing upon this case, especially as one of them,with respect to religious societies,

Opinion :—as to perpetuity—act about religious societies.

resembles, in its provisions,the Statute of 9 Geo. II. The acts to which I have reference are to be found in the *Dig. Del. Laws* (1829), 457-9, under the title "Religious Societies." The first is entitled "An act for the enabling of religious societies of protestants within this Government to purchase lands for burying grounds, churches, houses for worship,schools," &c.,passed in 17 Geo. II. The peculiar phraseology of the title of this act may be supposed to imply a negation of charitable uses. The provisions of the act are confined to religious protestant societies. It was an act of the Colonial Assembly, intended for the benefit of such religious societies, being protestant, as were not of the Church of England. The latter, being established by law, had a legal existence, and was secure in the enjoyment of its legal rights : the former, although tolerated, it was supposed had not a legal capacity, either to receive or protect any temporal rights. Besides, cases had occurred in which decisions had been made adverse to temporal interests of protestant religious societies not of the established church. *Attorney General vs. Richard Baxter*, 1 *Eq. Ca. Ab.* 96; 1. *Vern.* 248. There is no protection for charitable uses to any religious body not belonging to the established church except under the Toleration Act. *Loyd et al. vs. Spillet*, 3 *P. Wms.* 344, *in* 1734, as to dissenters. *Atty. Genl. vs. Andrews*, *1 Ves. Sr. R.* 225, by Lord Hardwicke in 1741, as to Quakers. *The Atty. Genl. vs. Cock*, 2 *Ves. Sr. R.* 273, in 1751, by Sir John Strange, Master of the Rolls, in the case of Baptists. In the *Atty. Genl. vs. Pearson*, 3 *Mer.* 409, Lord Eldon quotes Lord Mansfield's words; "the Toleration Act established dissent."

For religions not tolerated, there are no valid charitable uses ;—1 *Vent.* 293; *Fitzg.* 64; 2 *Swans*, 539; *Ambl.* 228; 2 *Swans*,470;—none for supporting or teaching the religion of the Jews; but for the maintenance of poor Jews and for their instruction in letters they are good without the aid

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of the statute. *Ambl.* 228; 2 *Swans.* 487. The Toleration Act of I William and Mary, ch. 18, did not extend to the colony of Pennsylvania, and consequently not to the counties on the Delaware; nor is there a word in the charter of Charles II securing that right to the Colonists, and only one clause on the subject of religion in the 22d section, and that of rather a contrary character; for it inhibits all annoyance to any preacher or preachers approved by the Bishop of London and sent into the Colony at the request of the inhabitants, to the number of twenty, expressing their desire to the Bishop to that effect. The suspected faith of Charles II, the well known faith of the Duke of York, the friend of William Penn, and the prevalent though most unfounded doubts of Penn's own sincerity would have made a clause of general toleration in the charter a theme of outcry against popery in disguise. Whatever may have been the cause of this omission in the charter, it was clear that so far as it professed toleration it was only toleration for the Church of England, as by law established; and this jealousy of dissent on the one hand, and a like jealousy of the established church on the other manifesting itself variously, but among other forms in the two great points of affirmations and the estates of religious societies of protestant dissenters, without any the least intermixture of the question of charitable uses generally, were the cause of a contest between the crown and Colony through the whole reign of Queen Anne to the end of George I; and, though it was mitigated at the close of his reign, and still further in the reign of George II, yet so much of it as regarded charitable uses for the propagation of religion was extinguished, with the principle on which they were resisted, only by the Revolution of 1776. The Uniformity Act of Charles II before the charter, the Toleration Act afterward, which did not extend to the Colonies, the 8th sec. of 5 Anne, ch. 8, extending the establishment to England and "the territories thereof," which by some was inter-

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preted to embrace the Colonies, the absence of all express toleration in the charter, and the tendencies of Queen Anne's reign to spread the influence of the Church of England, made the position of the property of the other churches in the Colony a subject of great uneasiness; and the more so from the pertinacious refusal of the crown to permit any law in relief of conscientious scruples in regard to oaths. The object of the act of 1731 was to counteract religious intolerance and to place all protestant religious societies on the same footing on which the established church stood in England and also in the Colonies. For a full and lucid historical and legal detail upon this subject, I would refer to the argument of Mr. Binney in the case of *Vidal et al. vs. City of Philadelphia.* The Pennsylvania act was passed at the same time with ours, and is precisely similar.

The extracts from the argument of Mr. Binney in the case referred to have been made to direct attention to them, and because our act and the Pennsylvania act were enacted at the same time and under the same proprietary government; and the historical and legal details I consider have the same application.

The Revolution of 1776 having dissolved the connection of the Colonies, and rendered each State sovereign, the constitution separated Church and State. This new state of things placed all religious societies upon the same platform—the 29th Article declaring, "there shall be no establishment of any one religious sect in this State in preference to another." (See Constitution or system of Government, Sept. 20th, 1776. See also the Constitution of the State of Delaware, 1792.) No preference was to be "given by law to any religious societies, denominations or modes of worship." Art. 1, Sec. 1. Again, it was provided that "the rights, privileges, immunities and estates of religious societies and corporate bodies should remain as if the Constitution of the State had not been altered." Art. VIII, Sec. 9. Previous to the Constitution of 1792,

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in the year 1787, under that of 1776, an Act of Assembly made provision prescribing the mode whereby all religious societies, in compliance therewith, might become incorporated and appoint trustees; also authorizing such corporations to acquire and hold real and personal estate. To guard against the undue accummulation of real estate the title thereto could only to a limited amount of annual income be acquired, and that only by deed executed and in the mode specially designated. This Act, like that of 9 George II, so far as religious societies were concerned, prohibited all testamentary provisions out of real estates. The Act cannot be considered as affecting charitable uses generally; and, with respect to the corporations created under it, has always been confined to such devises as related to or embraced real estate.

Considering the question presented in the case stated not to be within the Acts referred to, nor within the rule of perpetuity, I shall next proceed to examine the other grounds relied on as invalidating the devise.

2. I have already observed that the refusal of the trustees cannot affect the validity of the devise if there be no other objection. It is said that in this case the testator has marked out or attempted to mark out and establish his own particular plan or medium for ascertaining and designating the individuals under the general and indefinite class of the poor, to which individuals, thus ascertained, his bounty was to be apportioned and distributed, viz; by agents, to be appointed by the Orphans' Court or Levy Court of Kent County, as may be deemed most proper. It is contended that the said plan or medium is in itself absolutely and materially defective and uncertain and incapable of being carried out, by reason, particularly, of uncertainty as to which one of the said two Courts shall appoint the said agents; and that, therefore, the devises and dispositions of the residue of said real estate are altogether uncertain and incapable of being reduced to cer-

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tainty, and are null and void. This objection is not founded on the uncertainty of the objects of the trust, but simply applies to the mode prescribed by the testator in which the agency for distribution is authorized to be appointed. The testator has defined the class and described the condition of the persons intended to be benefited by the trust. The distribution to the persons answering the description by the agents, when appointed, is imperative. They are not the depositaries of a general discretionary power, but of one so specially limited in its action as to be subject to the control of this Court,if it should be exercised contrary to the will of the testator. The power of appointment given to either of the two Courts named,if it is to be regarded as precluding both,would appear productive of a singular inconsistency. It would be equivalent to saying that because I authorize an act to be done by either of two persons named, therefore, neither shall do it. I apprehend the act to be done ought to be done by one or the other; and this Court should consider that it will be performed, unless advised to the contrary by the refusal of both. Then it appears to me the mode prescribed by the testator does not necessarily defeat the power of appointment by one or the other of the Courts designated. But suppose both to refuse to exercise the power of appointment, and thereby the agency for distribution should fail to be created, can this Court remedy the deficiency and call into existence an agency for applying the annual income of the trust fund so as to execute the trust? The case would not be different in principle from many that have been the subject of equity jurisdiction,supposing in all other respects the power of the Court embraces it. To explain and illustrate the position and apply the principle, I shall advert to the rule of equity as settled by decisions. This Court will not permit the general intention to fail for want of circumstances annexed, which by the fault or neglect of the parties cannot take effect. 2 *Ves. Jr.* 390.

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There are many cases where the most general gifts for charity have been executed. The circumstance that the trustee is unable by death to dispose of it makes no difference, because it is a power given to a person. Suppose there was no gift but only a power to the executor to dispose to such and such charities; there the charities survive. But here it is much stronger, because the testator has recommended a more particular charity than the general one. It is then impossible to say the charity must not be sustained. 1 *Ves. Jr.* 475. In the case under consideration the particular charity is accurately defined by the testator, the trust created, and the qualifications or condition of the objects to be the recipients of the benefit described. The agents to distribute, when appointed, must do it in the mode directed by the testator: hence, it is apparent the appointment and the agents appointed are but instrumental in giving effect to the general intention, which is charity. Suppose, then, the Courts neglect or refuse to appoint the agents, would it vary the case from that in *Att'y General vs. Boultbee*, 2 *Ves. Jr.* 380, where the persons having the authority neglected or refused to appoint? or that in which the testator devised to such charitable uses as he should appoint and no such appointment could be found? 1 *Vern.* 234; 7 *Ves. Jr.* 43, *n.*; or to such charitable uses as he should appoint, and he died without making an appointment? *Freem. Ch. Cas.* 261; *Mills vs. Farmer*, 1 *Mer.* 55. In these cases, it should be observed, the object of the charity and the person to designate it were both wanting; but, in the present case, the only defect relied on is the want of an agent to execute the distribution of the fund in the mode and to the objects the testator has himself directed in a particular manner. It may be said the objection does not rest on the ground I have stated, but rather on the fact that the appointment being vested in either the Orphans' Court or Levy Court, as may be most expedient, has negatived the possibility of either

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making the appointment. If this be so, and neither can appoint, then the case presented is one of no agency to distribute; and, from the authorities above referred to, I entertain no doubt this Court has the power, and would execute the trust. But, the right of appointment being given to either, I consider either may exercise it, and the agency would be legitimately constituted.

3. The third and last objection to the validity of the devise is, that the said devise of the residue of the testator's real estate is void for uncertainty, there being no *cestuis que trust* or beneficiaries designated in the will, nor ascertainable under its provisions, for whom an interest can be asserted in a court of equity.

This objection assigns as the ground of the uncertainty of the devise; *first*, that the will has not designated the beneficiaries, and *also* that under its provisions they are not ascertainable.

The limitation of an estate to the poor of a parish would, at law, be void (*Coke on Litt.* 3 *a*)because the rules of pleading require the claimants to bring themselves under the gift, and no indefinite multitude, without public allowance, can take by a general name; but, by way of trust, they are capable of taking; for they assert no title in themselves,but call upon the trustees to observe the dictates of good conscience. (*Gilbert on Uses*, 44). But who shall answer the description of poor of a parish—whether those who receive or those who do not receive parish relief—appears to have been considered a matter of doubt. Sir J. Leach, in the case of *Atty Gen'l vs. the Corporation of Exeter*, 2 *Russ.R.* 47, and Lord Lyndhurst, in the same case, 3 *Russ.R.* 395, determined that the objects of such a trust were the poor who did not receive parish relief; for, otherwise, it was said, the rich, by the diminution of the rates, would participate in the charity. But Lord Eldon thought that the fund should be administered without reference to parochial relief; for assistance might be given to a pauper without

exonerating the rich from their usual contribution to the rates. To the relief which the law had provided, further relief might be added, which the parish was not bound to afford. *S. C.* 2 *Russ. R.* 51, 54. Besides, the appropriation of the fund to the poor not in receipt of parish relief might still have the effect of conferring a benefit on the rich ; for persons who could not otherwise have maintained themselves, might, by means of the charity, be prevented from seeking assistance from the rate. See *S. C.* 3 *Russ. R.* 397.

The charitable uses declared in the testator's will and codicils are, "to and for the support, maintenance and education of the poor white citizens of Kent county generally, to be apportioned and distributed by agents to be appointed by the Orphans' Court or the Levy Court of Kent County, as may be deemed most proper; no part of the bequest to be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof."

It is apparent from the particular manner in which the testator has limited the application of his bounty that he intended it should be confined to such poor of the county as by timely aid would be kept out of the Poor House. With respect to the class of poor to be benefited, it is, therefore, neither vague nor indefinite. A bequest to the poor is one degree less general than charity at large, which may affect the administration but not the gift itself. A gift to the poor of a particular county is still less general than a bequest to the poor. But, in the present case, the devise being to the poor white citizens of Kent County generally, excepting such as are in the Poor House, and to be distributed amongst such only of the poor who by timely aid may be kept out, seems to approximate as near precision as the subject is capable of, considered as a classification of the objects of his bounty when creating a charitable

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use. Had he been more definite, and individualized the particular persons, the peculiar characteristic of a charitable use would have been merged in the existence of private right, and "made it that selfish thing that private property is, to require for it some characteristic that will give it the cast of personal possession and a lawful title, by which one man may say to another, even of the same bereaved family, 'it is mine and not yours.' The objection demands for charities that certainty and definiteness which are the badges of private right, but of charity its bane. Uncertainty in the sense of the law of charities is its daily bread. The greatest of all solecisms in law, morals, or religion, is the supposition of a charity to individuals personally known and selected by the giver. There is not, there never was, and there never can be, such a thing as charity to the known except as unknown." Uncertainty of person until appointment or selection is, in the case of a charitable trust for distribution, a never failing attendant. Hence, I consider the devise is not void because the beneficiaries are not individually designated in the will.

But it is further objected that, under its provisions, they are not ascertainable for whom an interest can be asserted in a court of equity. This part of the objection appears to imply a defect in the will of the testator in not conferring such a vested equitable interest in the objects of the class as would entitle them to enforce their equitable rights; or, in other words, that because no interest vests until appointment that, therefore, none exists. "Nothing can be more erroneous than the supposition that the equitable interest of the beneficiaries of a charitable use does not vest. It vests precisely in the same manner as a use under a private power of appointment. What the duration of the vested interest of the beneficiary shall be depends entirely upon the pleasure of the founder. It may be for life, for years, during good behavior, or at the will of the trustees; but in all instances, though it be an estate

or interest at will, it is from the time of appointment a vested interest." 3 *P. Wms. R.* 146; 3 *Atk.* 164; *Shelf. on Mort.* 169, 36 *Law Lib.*; 3 *Mer.* 402: 10 *Barn. and Cress*, 721; *Shelf. on Mort.* 765, *note* 9.

I shall now proceed to the consideration of the remaining question, viz. whether the devise is capable of being sustained and carried out in a court of chancery, according to the rules and principles of equity. This appears not to question the inherent jurisdiction of the court but its application in executing the purpose contemplated by the testator. Yet, as the objection may have been intended to question the jurisdiction of the Court in regard to its equity powers, as distinguished from its other powers, it may be proper to advert to the rule established upon the subject.

The principal—originally, almost the whole—jurisdiction of a court of equity was the administration of trusts, by protecting not only the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From that principle arose the practice of administering the trusts of a public charity. It was established by three early cases, that where property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of on a bill to be preferred in the Attorney General's name; not by a scheme before the Master, but by the King, the disposer of such charities, in his character of *parens patriæ*. 1 *Vernon* 224; 2 *Lev.* 167; *Freem.* 330. *In Moggridge vs. Thackwell*, 7 *Ves. Jr.* 83., Lord Eldon observed, "it being established that where money is given to charity generally and indefinitely, without trustees or objects selected, the King, as *parens patriæ*, is the constitutional trustee, he considered it difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification and a case in which by

matter *ex post facto* the gift stands before the Court, in consequence of that accident, as if it had been originally given indefinitely, without any means for carrying it into execution prescribed." The result however of an elaborate examination of all the authorities made by that learned judge was,that the general principle, thought most reconcilable to the cases,is that "where there is a general indefinite purpose of charity, not fixing itself upon any object, the disposition is in the King by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the Court will take the administration of the trust." And his Lordship said, in a subsequent case, that the distinction which he adopted in the last cited case was that where the bequest is to trustees for charitable purposes the disposition must be the subject of the scheme before the master; but where the object is charity,without a trust interposed,it must be by sign manual. 14 *Ves. Jr.* 372. See also 5 *Russ. R.* 112. General charity, if there are no trustees, is administered in one way; if there are trustees it is administered in another way; but nothing that is vague and indefinite can be administered at all. 2 *Turn. and Russ. R.* 265, *note;* 1 *Sim. and Stu. R.* 69.

By the general principles and the constitution of a court of equity a valid trust is entitled to protection whatever may be the defects of the legal estate. Generally, where a trust is valid, it is a fundamental maxim and principle of equity, and from what now appears it has been so from time immemorial, that the trust shall be protected and enforced by a court of equity. This is without any exception true of all lawful trusts. The universal rule in equity is that a trust shall not fail for want of a trustee; and if one is wanting the Court will execute the office; and this for an unanswerable reason, that in equity the trust is the estate. In a court of equity it is sufficient that the trust appears; and, if the party creating the trust has not appointed his own trustee, a court of equity will follow the

legal estate and decree the person in whom it is vested to execute the trust—it being a rule which admits of no exception that a court of equity never wants a trustee. *Coke on Litt.* 290. *b. note* 1, *sec.* 4, *by Butler.* The general rule is,that a trust shall never fail of execution for want of a trustee, and that if one is wanting the Court shall execute the office. *Coke on Litt.* 113. *a, note* 2, *by Hargrave.*

The expression that the trust is tied to the land was used as early as *Gwilliams vs. Rowell, Hardres* 204, in 1661. The principle was never applied for the benefit of particular persons only or of particular trusts. Trusts are executed in equity for all persons indiscriminately. Neither the negligence of the donee, nor accident, nor any other circumstance is permitted to disappoint the trust. *Brown vs. Higgs*, 8 *Ves. Jr.* 574 ; *Pitt vs. Pellham*, 1 *Ch. Cas.* 176, in which Lord Keeper Bridgman ruled the contrary, because the implied power of the executor to sell for distribution among legatees never could arise and was void at law, as it was to be executed after the death of the donee; but this decision was reversed by the House of Lords, and the heir was decreed to convey. 1 *Sug. on Powers* 135 ; 2 *ib.* 174. In the *Atty. Genl. vs. Downing*, Lord Chief Justice Wilmot reiterates the principle : "I take it," he says, "to be a first and fundamental principle in equity that the trust follows the legal estate where ever it goes, unless it comes into the hands of a purchaser for valuable consideration without notice." *Wilmot's notes*, 21. Trust estates do not depend on the legal estate for an existence. A court of equity considers devises of trusts as distinct, substantive devises, standing on their own basis, independent of the legal estate or of one another; and the legal estate is nothing but the shadow which always follows the trust estate in the eye of a court of equity, *p.* 22. The individuals named as trustees are only the nominal instruments to execute that intention ; and if they fail, either by death or being under a disability to act or refusing to act, the constitution has provided a trustee, *p.* 24.

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The Atty. Gen'l. vs. Hickman, 2 *Eq. Cas. Ab.* 193, was the case of a charity, where the trustee died before testator, and the legal estate created by the will failed altogether. Lord King, nevertheless, established the trust. *Eales vs. England*, *Prec. in Ch.* 202, ruled by Sir John Trevor, is to the same point. See 1. *Bro. Ch. Rep* 81, *Jonley vs. Clock-makers' Co.*; *and* 1 *Ves. Jr.* 475. It is known universally that a trust legacy cannot lapse because the trustee dies, but it survives for the benefit of the *cestui que trust.*

It is a settled principle in equity that a trust shall never fail for want of a trustee. 2 *Story's Eq. Jur. sec.* 1059. This principle of equity does not appear to have been derived from the Statute of 43 Elizabeth or any other statute. It is not a principle derived from the law of charitable uses, but they have taken the benefit of this principle as it exists in the great code of equity. Sir John Leach says; "the jurisdiction of courts of equity with respect to charitable bequests is derived from their authority to carry into execution the trusts of any will, or other instrument, according to the intention expressed. *Atty. Gen'l. vs. Ironmongers' Company*, 2 *Mylne & Keen* 581; *Shelf. on Mort.* 630.

But, admitting the existence of the principle, it is supposed that courts of equity in England originally exercised the power of protecting charitable uses only by or under the Statute of 43 Elizabeth; and that where the Statute does not extend or has not been adopted they have no such power; or that charitable trusts are excepted out of the general jurisdiction of chancery over trusts.

This is no doubt the material ground relied on by the defendants in this case, inasmuch as the Statute of Elizabeth has not been in form adopted in this State—there never having occured any proceedings under its provisions or conformable thereto.

This is a question of judicial history—a question of fact. If, therefore, it be ascertained that Chancery exercised original jurisdiction over charitable uses anterior to the

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Statute of 43 Elizabeth it must establish the position that it was not derived therefrom. The *dictum* of Lord Loughborough, in *The Atty. Gen'l vs. Bowyer*, 3 *Ves. Jr.* 726 first questions this jurisdiction. He says; "it does not appear that this Court,at that time(namely before the Statute of 43 Elizabeth) had cognizance, upon information, for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this upon which I am now sitting; but they made out the case, as well as they could, at law." This was evidently the impression of Chief Justice Marshall, and was so applied in *The Baptist Association vs. Hart's Ex'rs.* 4 *Wheat. R.* 1. Until the decision in *The Baptist Association case*, in 1819, no adverse decision had been pronounced against these charitable uses. In one or two instances they had received confirmation, in Pennsylvania, from judicial proceedings. Two cases had occured in the Supreme Court of Massachusetts, and had been sustained by an elaborate judgment of that learned Court. *Bartlet vs. King's Ex'r.* 12 *Mass.R.* 537, in the year 1815; *Trustees of Philips Academy vs. King, Ex'r.* 12 *Mass. R.* 553, in the same year. Since the year 1819, however, the cases of charitable uses have been brought into judgment in most of the States; and, although Maryland, in the same year, and in 1822 and 1823, followed out the reasoning in *The Baptist Association case* and went beyond it, as Virginia has since done in 1832, overthrowing them almost from the foundation, yet in ten or more of the States, including Pennsylvania, they have been sustained. Since the decisions in the cases adverted to the question has been again under consideration in the Supreme Court of the United States, and the opinion of the Court as delivered by Mr. Justice Story in the case of *Vidal et al. vs. Girard's Exr's.* 2 *Howard's S. C. Rep.* 127, restricts *The Baptist Association case* to the influence of state legislation and the peculiar circumstances of the donees (the trustees)

as being an unincorporated association which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries also being uncertain and indefinite. "Both circumstances, therefore," he says "concurred—a donation to trustees incapable of taking and beneficiaries uncertain and indefinite. The Court, upon that occasion, went into an elaborate examination of the doctrine of the common law on the subject of charities antecedent to and independent of the Statute of 43 Elizabeth,ch. 4; for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights, (certainly in no small degree shadowy, obscure and flickering,) the Court came to the conclusion, that at common law no donation to charity could be enforced in chancery where both of these circumstances or both of these defects occurred. The Court said, "we find no *dictum* that charities could be established on such an information (by the Attorney General) where the conveyance was defective or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking." The evident import of this decision is that the devise itself was invalid; and being so,a Court of Chancery could not give it validity unless by virtue of the Statute of 43 Elizabeth, which having been expressly repealed in Virginia negatived the exercise of any such power. It is manifest the Court did not intend to decide against the general jurisdiction of chancery over charitable uses. This more fully appears from the character of the cases referred to by Justice Story in connexion with the *dictum* of Lord Loughborough, and the case Lord Loughborough is by him supposed to have had under his consideration, being *Porter's case*, 1 *Coke Rep.* 16, in regard to which Justice Story observes:—"it was resolved by the Court that the use was a good, charitable use, and that the Statute did not extend to it. So that here we have a plain case of a charity held good before the Statute of

Elizabeth upon the ground of the common law, there being a good devise originally, although the condition was broken and the use was for charitable purposes in some respects indefinite. Now,if there was a devisee capable to take as trustee,and the charity was good at common law,it seems somewhat difficult to say why, if no legal remedy was adequate to redress it, the Court of Chancery might not enforce the trust, since trusts for other specific purposes were then, at least when there were designated trustees, within the jurisdiction of Chancery. There are, however, *dicta* of eminent judges (some of which were commented upon in the case from 4 *Wheat.* 1.)which do certainly support the doctrine that charitable uses might be enforced in Chancery, upon the general jurisdiction of the Court, independently of the Statute of 43 Elizabeth,and that the jurisdiction had been acted upon, not only subsequent but antecedent to that Statute. Such was the opinion of Sir Joseph Jekyll, in *Eyre vs. Countess of Shaftsbury*, 2 *P. Wms. R.* 102; 2 *Eq. Cas. Ab.* 710 *p* 2,and that of Lord Northington in *Atty. Gen'l. vs. Tancred*, 1 *Eden R.* 10; *S. C. Amb. R.* 351; 1 *Wm. Bl. R.* 90; and that of Lord Chief Justice Wilmot in his elaborate judgment in *Atty. Gen'l. vs. Lady Downing*, *Wilmot's notes p.* 1–26, given after an examination of all the leading authorities. Lord Eldon, in *Atty. Gen'l. vs. The Skinner's Co.* 2. *Russ. Rep.* 407, intimates, in clear terms, his doubts whether the jurisdiction of chancery over charities arose solely under the Statute of Elizabeth—suggesting that the Statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the Court by which void devises to charitable purposes were sustained. Sir John Leach, in a case of charitable use before the Statute of Elizabeth—*Atty. Gen'l. vs. The master of Brentwood School* 1 *Mylne & Keen* 376—said, 'although at this time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute.'

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In point of fact, the charity was so decreed in that very case in the twelfth year of Elizabeth. But what is still more important is the declaration of Lord Redesdale, a great judge in equity, in *Atty. Gen'l. vs. The Mayor of Dublin*, 1 *Bligh. R.* 312, 347 (1827); where he says, 'we are referred to the Statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That Statute only created a new jurisdiction: it created no new law. It created a new and auxiliary jurisdiction—a jurisdiction created by commission &c.; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that Statute; and there can be no doubt that by information by the Attorney General the same thing might be done.' He then adds that 'the right which the Attorney General has to file an information, is a right of prerogative. The King, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases.' So that it appears Lord Redesdale maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of chancery independently of the Statute of 43 Elizabeth. In addition to these doctrines and *dicta*, there is the very recent case of *The Incorporated Society vs. Richards*, 1 *Drury and Warren*, *R.* 258, where Lord Chancellor Sugden, in a very masterly judgment, upon a full survey of all the authorities and where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to

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make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the Statute of Elizabeth.

Mr. Justice Baldwin,in the case of *the will of Sarah Zane*, at the April Term of the U. S. Circuit Court in 1833,after a very extensive and learned research into the ancient English authorities and statutes, arrived at the same conclusion; in which the district judge,the late lamented Judge Hopkinson, concurred; and that opinion has a more pointed bearing upon the present case since it included a full review of the Pennsylvania laws and doctrines on the subject of charities."

Justice Story, having thus noticed the question of jurisdiction in connection with all the authorities and all the lights existing anterior to the Girard case, which at the time of the decision made in that of *The Baptist Association*, he says, was certainly in no small degree shadowy, obscure and flickering, proceeds, at page 196, to observe that "very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the Chancery records in the reign of Queen Elizabeth and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the Statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities, where there were trustees appointed for general and indefinite charities, were familiarly known to and acted upon and enforced in the Court of Chancery. Some of these cases were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were

either no trustees appointed or the trustees were not competent to take. These records do, therefore, in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the trustees of *The Baptist Association vs. Hart's Ex'rs* was before this court (1819) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded. If then this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It has been fully recognized and enforced in the State courts of Pennsylvania, as far as their remedial process would enable these courts to act; *Witman vs. Lex.* 17 *Serg. and Rawle.* 88; and especially *the case of Sarah Zane's will* before Justice Baldwin and Judge Hopkinson in the Circuit Court."

From the preceding remarks of Justice Story in the opinion of the Supreme Court of the United States, as by him delivered in deciding the case of *Vidal et al. vs. Girard's Ex'rs*, it is apparent that the question as to chancery jurisdiction over charities, independent of the Statute of 43 Elizabeth, is concluded and all doubts entirely removed, especially with respect to its existence and exercise in England. If, then, the jurisdiction appertains to the courts of Pennsylvania, by virtue of the charter provisions which are the same in relation to the three counties on Delaware as granted by William Penn, how much stronger is the ground for its exercise presented in this state, when we advert to the Act of Assembly, 1 *Vol. Del. Laws*, 130, *Sec.* 21, declaring there shall be a court of equity, and the subsequent establishment by the constitution of the Court of Chancery, with full powers and all that had by law been granted. The first act is plenary, and is to be found in

Opinion :—conclusion.

Dig. Del. Laws,102, *Sec.* 21. (1829.) This act established a court of equity to be held by the Justices of the County Courts of Common Pleas; which said justices,or any three of them within the limits of their commissions and authorities, were, by virtue of the act, empowered and authorized " to hear and decree all such matters and causes of equity as shall come before them in said courts, where the proceedings shall be, as heretofore, by bill and answer, with such other pleadings as are necessary in chancery courts and proper in these parts, with power to issue subpœnas and all other process as may be needful, &c., to award commissions, grant injunctions, as there may be occasion, observing, as near as may be, the rules and practice of the High Court of Chancery in Great Britain, with power to make orders and award all manner of process, and do all other things necessary for bringing causes to a hearing, and to enforce obedience to their decrees in equity, which may be by imprisonment of bodies or sequestration of lands, and admit bills of revivor as the case may require."

Under this view of the questions presented by the case stated, I must enter a decree establishing the trusts of Col. Potter's will, and perpetually restraining his heirs at law from their action to recover the devised premises.

Decree affirmed by the Court of Errors and Appeals, at June Term, 1849.—*See Appendix.*

APPENDIX

The following case in the Court of Errors and Appeals, decided on appeal from the decision of the Chancellor before reported in this volume, not having been published in the reports of the Court of Errors and Appeals, is deemed of sufficient importance to be here appended.

POTTER GRIFFITH ET AL.

vs.

THE STATE OF DELAWARE.

In the Court of Errors and Appeals, at the June Term 1848.

A valid trust can never fail for the want of a trustee.

Wherever may be the legal estate, if the trust is valid it will be protected and enforced in a court of equity.

Devise in trust for the benefit of "such only the poor of Kent County who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof." *Held* to be a description of the beneficiaries not too uncertain to be carried into effect.

Devise of a fund to trustees for the benefit of the poor of Kent County &c,—"the distribution thereof to be made by agents to be appointed by the Orphans' Court or the Levy Court of Kent County, as might be deemed proper." *Held*, that either the Orphans' Court or the Levy Court were competent to appoint the necessary agents for distribution of the fund; but that were it otherwise, or were both the courts designated to refuse or neglect to make such appointment, the Court of Chancery is competent to supply the required agency.

Where a power of appointment is vested in one of two persons or bodies, either may exercise it; and the one first exercising it does so to the exclusion of the other.

Statement of the case.

Uncertainty as to the objects of a charitable use is not an objection to its validity. In this respect charitable uses differ from ordinary trusts. If the objects be uncertain, or the particular mode of application fail, the fund may be administered in England either by the Crown as *parens patriæ* or by the Court of Chancery; in this State such a charity will be administered by the Court of Chancery.

The rule of law against perpetuities is not applicable to trusts for charity.

The English Statute of Mortmain of 9 George II is not in force in this State.

The third section of the Statute of this State which prohibits devises of lands to religious societies, except in the mode therein prescribed, does not apply to devises to charitable uses generally.

The jurisdiction of the Court of Chancery to enforce such charitable uses as were void or defective at common law was not derived from the Statute of 43 Elizabeth, but existed prior to and independently of that Statute.

The jurisdiction over charitable uses exercised by the English Court of Chancery is by the constitution and laws of this State vested in its Court of Chancery.

This was an appeal from the decree of the chancellor establishing certain trusts of real estate for charity under the will of Benjamin Potter dec'd, in the case reported ante p. 392.

The heirs at law of the testator, being advised that the devise to charity was void, brought their action of ejectment to recover the real estate devised. Thereupon, in order to obtain a judicial decision as to the validity of the trusts, a case stated was agreed upon and filed in the Court of Chancery, wherein the State of Delaware was made a party complainant and the heirs at law defendants, with the same effect as upon an information filed by the Attorney General to restrain the ejectment at law and to establish the trusts of the will.

The devise in controversy, as resulting from the will and codicils of the testator, was of all the residue of his estate, including a large real estate, situated in Kent County, to Potter Griffith, George S. Adkins and Levin H. Adams, (who were also appointed Executors) in trust "to be by them my said executors rented out and the proceeds arising from such rents to be applied to and for the support,

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maintenance and education of the poor white citizens of Kent County generally"—the distribution thereof to be made by agents to be appointed by the Orphans' Court or the Levy Court of Kent County, as may be deemed most proper. "I wish it to be clearly understood that no part of my bequest shall be applied to the use or benefit of any person or persons residing within the walls of the Poor House; but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof." *

The trustees named in the will declined to accept the trust.

The questions raised by the case stated turned upon the validity of the devise in trust above quoted and the power of the Court of Chancery to establish and execute the same. It was agreed that if the Chancellor should be of opinion that the trusts were valid and such as could be executed in a court of equity, the ejectment at law brought by the defendants should be perpetually restrained and the trusts of the will established; but that if the Chancellor should be of opinion that the trusts were invalid and such as could not be executed in a court of equity, a decree should be entered accordingly. A right of appeal was reserved to the respective parties.

The Chancellor upon the hearing of the case stated rendered a decree, sustaining the devise in question and perpetually enjoining the heirs at law from prosecuting any claim to the real estate. From this decree an appeal was taken by the heirs at law.

The appeal was argued in the Court of Errors and Appeals at the June Term 1848, before Booth C. J. and Harrington, Milligan and Wootten, Justices.

D. M. Bates, for the appellants, the heirs at law.

There are two distinct objections to the validity of this devise to charitable uses. One is its uncertainty; the other that it seeks to create a perpetuity in real estate.

First. And first, as to its *uncertainty*. Two great questions are here involved, viz, (1) whether on general principles, applicable to trusts at large, this devise would be void for uncertainty? and if so,

* The material parts of the will and codicils are set forth at large *ante p.* 394, *note.*

(2)whether because it is a devise for charity the court will notwithstanding its uncertainty, execute it according to the English doctrine of peculiar favor to charities, as held prior to the Statute of Mortmain, 9 Geo. II?

I. Is the devise, on principles applicable to trusts at large, void for uncertainty?

No disposition of property can be carried into effect unless it is certain as to the *subject matter* disposed of, the *objects* to take, and the *interests* to be taken. 1 *Jarman on Wills*. 315 &c. 2 *Sto. Eq. Jur*. 979, *a*,

This rule is a necessary result of the want of power in the court to do any thing but execute strictly the intent of the grantor. It is an *unvarying* rule. It applies with as much stringency to dispositions by *will* as by *deed*,—to the creation of *trusts* as to the limitation of *legal estates*.

The present trust is fatally uncertain as to every thing essential except the subject matter of the gift;—but more particularly so as to the *objects to be benefited*; and in regard to these the uncertainty lies in two particulars;—

1. The objects are of so vague and indefinite a description that even if there was a power of selection appointed the devise must fail as a trust.

A trust differs from a *power*. The latter may be exercised *ad libitum*. But a trust must be exercised according to the intention of the person creating it, for the benefit of objects described, and subject to the control of the Court. Hence, the description of the objects must be so far definite that the trustee may know precisely whom the testator meant to benefit, that there may be somebody with an interest in the trust sufficiently vested to call on the trustee to perform it; and that the court may be able to control the trustee and see in whose favor to enforce the trust.

By *definiteness* it is meant that the objects should be of such a known description that it can be determined who they are by *some certain rule* or *standard of proof*, so that it shall not be a mere matter of opinion or judgment. This view is fully illustrated and supported by *Morrice vs. Bishop of Durham*, 9 *Ves. Jr*. 398; *Mills vs. Farmer*, 3 *Mer*. 15; *Brown vs. Yeale*, 7 *Ves. Jr*. 50; 2 *Bac*.

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Abr. 200, *new ed'n*; *Atty. Gen. vs. Dashiel*, 6 *Harr. & Johns.* 1; *S. C.* 5 *Harr. & Johns.* 392; *Gallego's Exr's vs. Atty. Gen.* 3 *Leigh's R.* 450,

Are the objects of the present trust *definite*? Is there any general rule or criterion by which it can be positively determined who are and who are not "such of the poor of Kent County as by timely assistance would be kept out of the Poor House, and who but for such assistance would go there"? Or, does it not rather depend upon a great variety of considerations entering into each case, such as the pecuniary circumstances, moral character, habits, health, age, sex, standing in society and even family relationships of the individual? If so, then the answer to the question, who are the objects of the given description, is mere matter of *opinion*, varying with every man's judgment, is subject to no *rule*, and is, therefore, *uncertain*.

2. The objects are further uncertain in this respect, that there is *no effectual provision for their selection*: so that no *cestuis que trust* can ever be brought into being and invested with rights to be asserted in a court of equity.

A devise to "*twenty of the poorest of testator's kindred*" has been held to be void for the reason that it cannot be adjudged who are such persons, so a devise "*to the two best men of the white Towers*". 1 *Powell on Dev.* (362) 21 *L.L.* 214. So if this were a devise *directly* to the "poor of Kent County &c.," it would be clearly void; because under such a description no one could establish a right. To render uses of so general a nature complete it is at least essential that there should be provided some medium for ascertaining and designating the *individuals* of the class. For only thus can any become invested with an interest so as to call upon a court of equity to enforce the trust.

The same result follows whether the testator creates a general use, without any provision at all for the selection of the objects, as in the cases cited from Powell; or whether he attempts *ineffectually* to make such provision. Of the latter an instance is found in *Baptist Association vs. Hart's Exr's* 4 *Wheat. R.* 1.

In the present case there is an *ineffectual* attempt to provide a mode for the selection of the object—"the apportionment and distribution thereof to be made by agents to be appointed by the Orphans' Court or the Levy Court of Kent County, as may deemed most proper." Under this provision the power of selection is vested nowhere. It

does not exist in either of the Courts named *solely*, nor in *both together*. It is wholly indeterminate.

There is no power in the Court, acting within its general equity jurisdiction, to remedy this defect. It is not the want of a trustee to carry into effect a perfect and valid use, but it is a *defect in the use itself*, rendering it impossible to bring into existence any *cestui que trust*. And until the *cestui que trust* is first ascertained and designated, the Court, which in its general jurisdiction acts only upon a bill filed between parties, can take no step in the matter.

II. This brings us to the next great question, viz:—Assuming the trust to be uncertain and indefinite—such as cannot be executed upon principles governing trusts at large—yet is it good as a charitable use, according to the English doctrine of peculiar favor to charity, as held prior to 9 Geo. II?

The doctrine referred to was this;—that *charitable uses* were objects of favor—that "the motive of the gift and the purpose to which it was to be applied, distinguished such uses above all other appropriations of property and entitled them to peculiar favor." (*Sergeant's argument of the Girard will case*, 226,)—So much so, that what the testator had shown a disposition to devote to charitable purposes should *in no event* go to the heir; so that if the purposes named were *illegal* the court would devote the property to other uses of a charitable nature. And if the objects were *uncertain*, so that none could claim in a court of equity by bill, the disposition fell to the king *as parens patriæ*, and was made through the Chancellor as the delegate of the crown, upon an information filed by the Atty. Gen. 2 *Story's Eq. Jur.* 1165–1173.

To the adoption of this doctrine here, and to the exercise of the powers involved in it, we object upon several grounds;—

I. Charitable uses, which were void upon principles applicable to other trusts, derived their validity from the Stat. *Char. Uses.* 43 Elizabeth which is not in force in this State.

The question is not whether chancery derived its *whole* jurisdiction over charitable trusts from that Statute. Undoubtedly it has always possessed the same jurisdiction over charitable uses, as over all other trusts; but that the *extraordinary jurisdiction peculiar to charitable trusts*, which came to be exercised, grew out of the Statute of Elizabeth, will be evident from many considerations.

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1. *One arises out of the Statute itself.*—The preamble, reciting certain "breaches of trust &c.," manifestly has reference to a class of trusts for enforcing which there had been no previous remedy. Compare the preamble of our act enabling religious societies to purchase lands for certain purposes.—*Digest Del. Laws* 457. See also the comment of Marshall, C. J., in the *Baptist Association case*, 4 *Wheat. R.* 1; and of the Virginia Court of Appeals in *Atty. Gen. vs. Gallego's Ex'rs.* 3 *Leigh's R.* 450.

Hence, the creation of a new and peculiar jurisdiction, that of commissioners, armed with inquisitorial powers, unknown to a court of equity, and clearly designed for the very purpose of reaching trusts for *uncertain* objects, of which, for want of parties, chancery had previously been unable to obtain cognizance so as to enforce them.

2. The decisions *subsequent to the Statute* determine its construction and effect in accordance with our view.

In the text of 2 *Fonb. Equity* 213. *Part* 2 *chap.* 1, *sec.* 2. written as early as 1728, we are told that the *intent* of the Statute was held to be "to make the disposition of the party as free and easy as his mind;" and that to carry out this intent the words "limited and appointed" were laid hold of as "supplying all defects of assurance *either in the giver or receiver*, where the donor is of capacity to dispose, and hath such an estate as is in any way disposable by him." See also 2 *Black. Com.* 375–6.

This testimony is confirmed by a series of judicial decisions, running through a period of one hundred and fifty years next following the Statute (passed in 1601), in which charitable trusts held to be void upon general principles for every variety of defect, both in the instrument creating the trust and as to uncertainty of the objects, were adjudged valid and enforced *expressly by force of the Statute. Duke's Char. Uses* 355; 2 *Bac. Abr. Char. Uses* (*E.*); *Flood's case, Hobart* 136, *Duke* 372,3 (1616); *Collison's case, ib.* (1618); *Christ's Hospital vs. Hawes, ib.* 370, (1620); *Stoddart's case*,1 *P. Wms.* 247, *Duke* 373 (1622); *Platt vs. St John's College. Finch* 221, 1 *Chan. Cas.* 267, *Duke* 379 (1638); *Rex vs. Newman*, *Levinz* 284 (1657) *Parish of Great Creaton vs. Palmer's Exrs.* 1 *Chanc. Cases* 195 (1658); *Atty. Gen. vs. Rye*, 2 *Vernon* 453, *Duke* 382 (1703); *Atty. Gen. vs. Burdett*, 2 *Vern.* 755, *Duke* 385 (1717); *Atty. Gen. vs.*

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Sawtelle, 2 *Atk.* 497, *Duke* 395 (1742); *Atty. Gen. vs. Andrews* *Ves. Sr.* 225 (1748).

3. There is further evidence that the doctrines peculiar to charities were settled upon the Statute of Elizabeth. In cases adjudged since the statute, trusts for charitable purposes, in the general sense of the term charity, have been held void as indefinite trusts and not enforced *because they were not within the technical sense of charity as contemplated by the Statute. Morrice vs. Bishop of Durham*, 9 *Ves. Jr.* 399, 10 *Ves. Jr.* 522; *James vs Allen*, 3 *Mer.* 17; *Brown vs. Yeale*, 7 *Ves. Jr.* 50, *note* (*a*); *Ommaney vs. Butcher*, 1 *Turn. and Russ.* 260 (11 *Eng. Ch. R*); *Vesey vs. Jamson*, 1 *Sim. and Stu.* 69 (1 *Eng. Ch. R.*); *Williams vs. Kershaw*, 1 *Keen* 230 (15 *Eng. Ch. R.*); *Ellis vs. Selby*, 1 *Mylne and Craig* 286, 293,299,(13 *Eng. Ch. R.*); 2 *Sto. Eq. Jur. sec.* 1158.

4. *As to cases prior to the Statute*—they should be numerous and well authenticated, and should show a clear and well established jurisdiction at that period over charitable uses void at law, in order to rebut the argument founded upon the plain construction of the Statute and upon the subsequent cases adjudged in such numbers expressly upon its provisions.

In fact there was no settled system at all of equity jurisprudence prior to the Statute of Elizabeth. Up to 1592 no lawyer had sat on the Chancery Bench for three centuries excepting Sir Thomas More, who was appointed by Henry VIII in 1530. 3 *Blk. Com.* 53–55. And considering the rapacity of the church, and the superstitious devotion of the people, and the fact that the Chancellor was for the most part an ecclesiastic, it would not be surprising if attempts had been made to introduce the civil law doctrines of *favor to charity*. However this may be, the uniform resort to the Statute after its passage to sustain these doctrines, sufficiently shows that independently of its provisions equity jurisdiction was considered inadequate to carry these doctrines into effect.

But the cases anterior to the Statute do not show that any extraordinary jurisdiction in regard to charitable uses was even attempted to be exercised at that period.

The large number of cases collected by Mr. Binney in his argument of the *Girard will case* (pp. 129—137) show only that chancery had *some* jurisdiction over *charitable* trusts—such as it had over all

trusts. But that it had then an *extraordinary* jurisdiction in regard to charities over and above that which applied to other trusts, the cases do not prove. For (1) not a *decree* in a single case is given. 2) Being taken only from *indexes* of the original records, it does not sufficiently appear what were the facts and circumstances of the cases. At least half show nothing but the names of parties and the general object of the bill. (3) Of the rest, so far as the facts appear, they may all have been enforced upon general principles without resort to any *extraordinary* jurisdiction.

On the other hand there are cases to be found prior to the Statute in which such indefinite charitable trusts are treated as being without a remedy in equity, while, if the remedy had existed, it must be supposed that resort would have been had to it. *Porter's case,* 1 *Co. Rep.* 22, as commented on by Marshall, C.J. in *Baptist Association case,*4 *Wheat. R.* 1 ; *Partridge vs. Walker,* 4 *Co. Rep.* 116. *b ; Martindale vs. Martin, Cro. Eliz.* 288 ; *Thetford School case,* 8 *Co. Rep.* 130.

II. Another general reason why the English doctrine of charitable uses cannot aid this case is,that even after the Statute 43 Elizabeth gave validity to *indefinite* charitable trusts they were carried into effect by a jurisdiction wholly distinct from that of equity. The present equity jurisdiction of our court could not reach such uses, even if they were recognized by law as valid.

The proper equity jurisdiction of the court is exercised only upon a bill filed by parties having an interest in the subject matter. But if a trust is *uncertain* in the sense of the law, no one can show an interest ; no bill can be filed : no cognizance obtained.

In view of this very defect the Statute provided for a *commission,* which might proceed *ex parte* to inquire after and enforce uses so vague and indefinite that it was impossible, for want of parties, to bring them within the jurisdiction of a court of equity.

The validity of indefinite charitable uses being established, by the Statute, the proceeding by information came to be resorted to and altogether superseded the commission. About the year 1675, the commission was abandoned and informations became the uniform mode of enforcing uncertain charitable uses. *Powell on Devises,* 21 *Law Lib.* 215. *n ; Atty. Gen. vs. Matthews,* 2 *Levinz,* 167

(1675); *Atty. Gen. vs. Peacock, ibid.* (1675); *Atty. Gen. vs. Syderfin.* 1 *Vernon* 224 (1683); *Atty. Gen vs Baxter*, 1 *Vernon* 248 (1684); *case in Freeman's Rep.* 261 (1702); *De Costa vs. De Pas. Ambler* 212 (1754); *Atty. Gen. vs. Clark, ibid* 422 (1762); *Atty. Gen. vs. Herrick, ibid* 712 (1792); *Moggridge vs. Thackwell*, 7 *Ves. Jr.* 35 (1802); *Mills vs. Farmer*, 1 *Mer.* 54 (1815).

It has been expressly decided that an indefinite charitable use cannot be enforced *except by information*. *Morrill vs. Lawson*, 4 *Viner's Abr.* 500; *Well Beloved vs. Jones*, 1 *Sim. and Stu.* 47. (1 *Eng. Ch. R.*)

The proceeding by information to establish a charitable use does not belong to the equity jurisdiction of the English Court of Chancery, but is founded upon a royal prerogative exercised by the Chancellor as the personal delegate of the crown. The power is not *judicial;* it is a *sovereign* power, vested in the king as *parens patriæ* and delegated to the chancellor as the nearest representative of the crown. It stands upon the same footing with his guardianship of *infants* and *lunatics*. 3 *Black. Com.* 46, 427; *Cooper's Equity* 27.

Under our Government such a power does not belong to the Chancellor as an equity judge. It must be conferred by the legislature; which has already by an express statute invested him with the care of *idiots*, and has given to another tribunal the guardianship of *infants*. *Dig. Del. Laws* 305; 9 *Del. Laws* 480 &c; *Gallego's Exr's. vs. Atty. Gen.* 3 *Leigh's R.* 450.

In North Carolina the power of enforcing charitable uses by information is conferred by statute. 2 *Bac. Abr.* (*new ed.*) 194; 1 *Hawks' Rep.* 96.

III. A third general objection to the English doctrine arises from a consideration of its origin, character and consequences.

This doctrine is not one of necessity.

It is not true that "uncertainty is the life of charity." Though a charitable use must of course be for *general* objects, rather than for individuals, yet it does not follow that there *must be uncertainty*. *Id certum est quod certum reddi potest*; and the objects, though uncertain *in the first instance*, can well be rendered certain by creating a power of selection and appropriation. Then, it is a doctrine not of *protection* to charity, but of *special favor*. *Sergeant's argument in Girard will case* 226.

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Again, the doctrine under consideration requires the exercise of powers that are extra-judicial and dangerous.

All appropriations of property by the owner, made in legal form and for lawful purposes, are entitled to the same favor. To discriminate is an infringement of the right of property. The power to discriminate at all is an arbitrary power admitting of no safe limit. The *rule of certainty* is not one of *discretion* with the court, but is a limit to its authority and cannot be dispensed with to give effect to any disposition of property.

By what *certain rule* shall it be determined what are and what are not charitable uses? In England the essence of charity is *public benefit* In this country what are objects of public benefit is the subject of a thousand conflicting opinions. No rule can determine it. To leave it to the *unbounded discretion* of a chancellor would be incompatible with a government of law. Such a discretion would be arbitrary and unsafe. *Burr's Ex'rs vs. Smith*, 7 *Vern.* 317.

Still again, this doctrine was adopted and employed for purposes inadmissible under our institutions.

It is not the principle of *benevolence* or *relief to necessity or suffering* that constitutes a charitable use an object of favor in the English law. Objects of simple *benevolence* have been excluded from the operation of the Statute of Elizabeth. *James vs. Allen* 3 *Mer.* 17. So, a gift to *private charity* is held not to be within the statute. *Ommaney vs. Butcher*, 1 *Turn. and Russ.* 260 (11 *Eng. Ch. Rep.*) Many of the objects enumerated in the statute have in them nothing of the principles of charity in its proper sense. And under its construction gifts of the most enlarged benevolence have been repudiated because the objects were dissenters from the established religion. *Baxter's Case*, 1 *Vern.* 248.

The doctrine had its origin in the Roman Law, and sprang directly from the religious fanaticism of Constantine and his age. Then gifts to charity were synonymous with gifts *ad pias causas* and gifts *pro salute animæ*. *Shelf on Mort.* 513, 14, 37 *L. L.* 356-7; 2 *Story Eq. Jur.* 1137-39, 40, 41; *Lord Thurlow, in White vs. White*, 1 *Bro Ch. R.* 12; *Lord Eldon, in Mills vs. Farmer*, 1 *Mer.* 94.

The same false religious spirit, only modified in its form according as the catholic or protestant faith prevailed, favored its introduc-

tion into England. In the ages preceding the reign of Elizabeth the charities of the people were dispensed solely through the church, greatly augmenting its power and resources. Charity was enjoined as a religious duty, essential to salvation. Besides, there was no provision *by law* for the poor until the reign of Elizabeth, although the impoverishment of the lower classes was so extreme in 2 and 3 Edward VI—that the king was obliged to surrender his fee-farm for three years for their relief. No wonder then that the statute 43 Eliz. was laid hold of to introduce a doctrine so consonant with the feelings of the people and the interests of both Church and State.

We further note in this history that the doctrine proved to be mischievous and led to the Mortmain Act of 9 *Geo. II.*

After it became too firmly established to be shaken, the judges felt its absurdity. In *Atty. Gen vs. Herrick Amb.* 712, Ld. Bathurst said, "he was inclined to favor the heir but the precedents were too many and too strong to contend with." In *Moggridge vs. Thackwell*, 1 *Ves. Jr.* 474, Ld. Thurlow says, "if the rule of the court had not been so distinctly established the question might undergo a different consideration." In the same case in 7 *Ves. Jr.* 86, Ld. Eldon pronounces it "strange doctrine;" and in *Mills vs. Farmer*, 1 *Mer.* 99, he says that *Moggridge vs. Thackwell* was decided by the force of authority, "much against his inclination."

Ld. Hardwicke, in 1 *Ves. Sr.* 223, 2 *Madd Ch.* 61, says that "the clergy got almost half the real property of the kingdom in their hands;" and he wonders they did not get the rest, "as the people thought they thereby purchased Heaven."

Against these evils the mortmain act was expressly directed. *Atty. Gen. vs. Weymouth, Amb.* 23; *Atty. Gen. vs. Day*, 1 *Ves. Senr.* 220. The act was held to be of so remedial a character that its provisions have been enforced with extreme rigor. *Shelf on Mort.* 122, (36 *L. L.* 101.)

IV. A fourth reason why the English doctrine cannot avail in this case is that by the modern decisions it is held to apply only to charities of *a public nature* and not to a *private charity*. *Ommaney vs. Butcher*, 1 *Turn. and Russ.* 260, (11 *Eng. Ch. R.*) is a strong case on this point.

In the present case, the trust is for *private charity*, the testator

expressly forbidding the application of the fund in the way of *public charity.*

If the devise cannot be effectuated as a *private* charity it cannot be applied by any other mode, the testator having expressly restricted it to the private channel. Even in England, if the testator's intention were *expressly restricted* to one purpose, the *cy pres* doctrine was not pressed so far as to substitute another purpose contrary to a *positive intention.* This doctrine, though perverted in its application, proceeded upon the hypothesis that the testator had a *general* purpose of charity, and was indifferent as to the particular mode of effecting it. 2 *Sto. Eq. Jur. sec.* 1182; *Corbyn vs. French,* 4 *Ves. Jr.* 418; *Atty. Gen. vs. Bishop of Oxford,* 1 *Bro. Ch. R.* 444, *note; Duke* 531.

V. The decision in the case of the *State vs. Wiltbank's Adm'r,* 2 *Harring. R.* 18, shows that the English doctrine of charitable uses has not been considered as obtaining in this State.

That was a devise of the proceeds of the sale of a testator's real estate to the trustees of the M. E. Church in Dover, in their corporate capacity, "to be applied by said trustees in such manner as they shall devise, towards educating poor children of members of said Church."

The Court held that the trustees were incompetent to take and execute the trust, under the act relating to religious societies (*Digest* 457), and upon this ground the decision rested. Now, the English doctrine of charity would have substituted some other discretion to select and educate these poor children; and the doctrine was fully discussed by the counsel. The fact that the Court decided the case without reference to the doctrine shows that they did not consider it of any force in our courts.

It can hardly be supposed that in the *Wiltbank case* the use itself was void; *i. e.* that it was unlawful to create a trust for the education of poor children in the M. E. Church. Nothing in the case shows that it was so considered. No such ground was taken. But, supposing it to be so, still the English doctrine would not have suffered the fund to go to the next of kin, but would have applied it to some lawful charity, as near as might be to the testator's intent. The devise would not have failed, had the English law of charity been received in this State.

Second. The second ground upon which we consider this trust as void, is that *it creates a perpetuity in real estate.*

The testator, expressly forbidding a sale of the estate, directs the trustees to receive the rents and profits forever, and to pay them over to the executors, in whose hands they are to constitute the fund for distribution. The existence of the fund thus depends upon the lands being held in perpetuity.

It is a long settled and inflexible rule, founded upon the highest policy, that by no device shall land be kept inalienable longer than a life and lives in being and twenty-one years afterward, even in the case of a beneficial holder. 4 *Cruise's Dig. Title Deed. chap.* 26, *sec.* 1.

It is also a rule, founded upon the same policy, that the use in land or the *beneficial ownership* shall not be separated from the *possession and control* of it for longer than a like period. This is the law of springing and shifting uses. 4 *Kent's Com.* 297.

A perpetuity *in trust* is the most obnoxious of all kinds. It not only renders the land inalienable but keeps it forever in the hand of a trustee without an interest in it, thus putting it in a condition of certain eventual depreciation and ruin.

It is incumbent upon our opponents to show *some sufficient reason* for exempting this trust from the rule merely because it is for a charity. In England charities were exempted from the rule against perpetuities under the doctrine already referred to, founded on the Statute of Elizabeth, which was expressly held to repeal the statutes of mortmain in favor of charitable uses. This answers all that is said in *Lewis on Perpetuity* 689 (52 *L. L.* 438). That only shows what was the law of charitable uses under the Statute.

To say that a trust for charity, *fastened upon land*, necessarily creates a perpetuity, is what we admit. But this is not assigning a *reason* why land should be suffered to be so locked up, even for such a purpose. And as an abundant channel for the diffusion of charity may be found in gifts of *personal* estate, or in the gift of land with the liberty to convert it into money, it would be difficult to find any sound reason, or any necessity, for relaxing the laws of property and unsettling a wise and well established policy, in order to afford a larger scope even for the exercise of charity.

By the act relating to religious societies of 17 George II., *Dig. Del. Laws* 457, religious societies in this State were first enabled to take and hold real estate, and that only for burying grounds and for *erecting* churches, schools and almshouses.

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What was the necessity for this act? By what law were religious societies previously disabled from taking land, even for building a church, unless it was the general law against perpetuities under which no trust could be fastened upon land forever? The act is evidence of a law of perpetuity in this State, even as to charitable uses; and it is evidence that the doctrine of charitable uses founded upon the Statute of Elizabeth never was in force here.

E. W. Gilpin, Attorney General, and *J. P. Comegys*, for the State.

The devise in the 18th item of Mr. Potter's will carries the fee, and vests it in the *trustees* therein named. This is the legal effect of the words, "all the balance or *residue of my* ESTATE, real, personal and mixed." The word "*estate*" carries the fee.

The *intention of the testator, as manifested by the trusts of the will*, shows conclusively that the *heirs at law should take nothing;* and the *intention* in wills, especially where *charity* is the object, should always govern.

The creation of the trust must rule the construction to be given to the will;—to ascertain the *extent* of the *legal estate*, you must look to the *scope and objects* of the trust. And it may be laid down as an established rule that, wherever a trust is created, *a legal estate sufficient for the execution of the trusts shall be implied.* *Lewin on Trusts*, 234, (24 *Law Lib.*)

In some cases the court will *supply* the legal estate *in toto*, and in other cases *extend* the legal estate. *Lewin on Trusts*, 234; 5 *Mod. R.* 63; 5 *East R.* 162. In this case the trust is for the establishment of a permanent charity; and nothing short of the *fee* is sufficient to enable the trustees to execute it.

The fee in the lands having once vested in the trustees under the will, their subsequent renunciation of the trust is of no effect. Nothing short of their decease, or a conveyance by deed, or their removal by a court of equity, can divest the legal estate out of them.

They may refuse to perform the trusts of the will; and this they have done by their renunciation. *But they cannot defeat or destroy the charity.*

But, it is hardly necessary to inquire whether the trustees took any or what estate under the will and codicils. If they took no

estate, then the devise is treated in equity as a direct disposition to charitable uses; and, as such, it is as valid to all intents and purposes, as if trustees had been interposed in whom the legal fee had vested.

It is settled, that the beneficiaries of a charity are entitled in a court of equity to have the valid trusts of the will protected, whatever may be the defects of the legal estate. This principle has never been questioned by any decision in this country or elsewhere.

Whether the estate of the intended trustee be void or not, or fail from any cause; whether a trustee be named or not; or whether he renounce the trust, are matters of no importance.

The rule is without any exception whatever, that *a trust shall never fail for want of a trustee.* The land itself *is bound by the trust*, no matter where the legal estate may be; for in equity *the trust is the estate.* 1 *Sug. on Powers*, 135 *&c.*; 2 *ib.* 174; *Pitts vs. Pelham*, 1 *Levinz R.* 304. Neither negligence of the donee, nor refusal of the trustee to accept the trust, nor accident, nor any other contingency or circumstance, will be allowed in a court of equity to defeat the trust. 8 *Ves. Jr.* 574. This principle applies both to the renouncing trustees and to the agents for distribution, who are also trustees for the purpose of distribution. If the Orphans' Court or the Levy Court should not appoint, the Court of Chancery may appoint. In *Walker v. Doyle*, 1 *Cha. Ca.* 180, where executors authorized to sell land *died before sale*, the heirs at law were treated as trustees and decreed to sell. Where trustees of charity die in the life time of testator, the management of the charity shall go to the heirs at law, but the charity shall be established. *Atty. Gen. vs. Downing*, *Ambler R.* 571.

In the case of *Atty. Gen. vs. Hickman*, 2 *Eq. Cas. Ab.* 193, which was the case of a *charity*, of an uncertain, indefinite character, the Chancellor established the trust, although the trustees had died before the testator. And the Lord Chancellor, King, in this case declared, that although by the death of the trustees, the legal estate of the legacy was gone, and the charity could not be disposed of by the very hands which the testator designed should have done it, *yet the charity itself, which is the substance and reason of the devise is still subsisting and may be as fully answered by the directions of this Court as if the trustees were living.*

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The same principle is established in the case of *Sonley vs. The Clockmakers' Company*. 1 *Bro. Ch. Rep.* 81. There the devise was void under the mortmain laws, being given to a corporation; but the Court established the trust. In the language of Baron Eyre, the trust was sufficiently created *to fasten itself upon any estate* the law might raise.

And it is upon this principle, namely, that the trust "*is tied to the estate*," that the trust "*is fastened to the estate*"—that the trust "*is the estate*," that courts of equity have disregarded the fact of whether there was a trustee or not, and have invariably executed the trust. *McCarty vs. Orphans' Asylum*, 9 *Cow. R.* 484.

It is said by Lord Chancellor Thurlow, in the case of *Moggridge vs. Thackwell*, 1 *Ves. Jr.* 475, that it is known universally that a trust legacy can not lapse because the trustee dies, but it survives for the benefit of the *cestui que trust.*

It is a settled principle in equity that a trust shall never fail for want of a trustee. 2 *Sto. Eq. Jur. sec.* 1059.

All charitable uses at common law are trusts, and as such are within the the jurisdiction of chancery. It is because they *are trusts*, that equity takes cognizance of them. *Atty. Gen. vs. Iron Mongers' Company*, 2 *Myl. and Keen*, 581, (8 *Eng. Ch. Rep.*)

The great question, however, upon the subject of charity, in the courts of this country, has hitherto been whether the jurisdiction of chancery, in cases of *vague, indefinite and uncertain charities*, is to be referred to the Statute of 43 Elizabeth, or to *the general original jurisdiction of the court.* Since the passing of the Statute, and *under* it, the Court has certainly and rightfully exercised jurisdiction in cases of the most *vague, indefinite and uncertain* description, and no one ever questioned its authority.

But the question now is, had the Court jurisdiction over these *vague, indefinite and uncertain* charities before the Statute?

If it had, then we contend that this Court must sustain and establish the charities of this will. And that it exercised such original jurisdiction before the Statute, we think is settled very conclusively by a multitude of decisions, both in England and in this country.

In the case of the *Atty. Gen. vs. Mathews*, 2 *Levinz R.* 167, the trust was for "*the poor in general forever*," and the commissioners under

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the 43 Elizabeth having made a decree in the matter, the Lord Keeper, Finch, quashed the decree, because, being a charity for the poor in general, the commissioners had nothing to do with it; and he ordered proceedings to be instituted in chancery.

In the case of *Eyre v. Shaftsbury*, 2 *P. Wms.* 119, the jurisdiction of chancery *before* the 43 Elizabeth is expressly asserted.

The same doctrine is held in the cases of the *Atty. Gen. vs. Lock*, 3 *Atk.* 163; *Atty. Gen. vs. Brereton*, 2 *Ves. Sr.* 425, and *Atty. Gen. vs. Middleton*, *ib.* 327. See also the case of *Atty. Gen. vs. Tancred*, 1 *Eden* 10; *S. C.*, 1 *W. Black* 90.

In the case of the *Atty. Gen. vs. the Mayor of Dublin*, 1 *Bligh* 347, Ld. Redesdale is reported to have said that the Statute created *no new law*. This case was before the House of Lords from the Irish chancery and brought up the question of the origin of chancery jurisdiction over charities generally before the Statute, and it affirmed the existence of such jurisdiction. To the same effect is 1 *Bligh* 61, and the case of the *Atty. Gen. vs. Brentwood School*, 1 *Myl. & K.* 376, (7 *Eng. Ch. R.*), where Sir John Leach, in 1833, speaking of a devise to a corporation in 1565, says that at the latter period chancery had original jurisdiction of charitable uses. To the same point are cases cited in *Mr. Binney's argument*, 126, and also fifty cases collected by him from the report of the commissioners.

It is objected that the objects of the charity are vague, indefinite, uncertain; that no estate or interest passes to or vests in any existing *cestuis que trust*, or in any one susceptible of ascertainment, and that even in case they could be ascertained they would be wholly incapable of transmitting their equitable interest in perpetual succession.

The argument is in fact, that the charity does not now and never can vest in any one; that it is not within the competency or power of any one or more of the poor of the County of Kent to show that he or they were intended to be benefited by the charity, and that they are not therefore capable of enforcing their claim as beneficiaries, either at law or in equity.

The same objection might be taken to all dispositions of property by appointment under powers. The persons to be benefited by the appointment of the donee of the power are altogether unknown and

uncertain. Until the appointment is made the matter remains executory; but the moment the power is exercised and the appointment made, the object intended to be benefited becomes ascertained and certain, and he acquires such a vested interest as may be enforced at law or in equity.

In the case of individuals this uncertainty is limited as to time, and cannot continue beyond a life or lives in being and twenty one years and nine months; but in the case of a charity there is no such limitation; it is permanent and perpetual; it shall never fail.

In this case, the Levy Court or Orphans' Court for the county may make the appointment, that is to say, may make the selection of the agents for distribution; but if they fail to do so the Court of Chancery will perform this duty, select the agents, and thus execute the trusts of the will, carrying out the charitable intentions of the testator. Where is the difficulty? The objects to be benefited are "the poor white citizens of Kent County generally" without the walls of the poor house. Can they not, from time to time, be ascertained and made certain by selection and appointment as proper beneficiaries of the charity? The *general class* is certain enough, namely, "the poor white citizens of Kent County" not being in the Poor House. The *particular objects* belonging to that class are capable of being made *certain* by selection; and, when thus ascertained, they become the equitable owners of that which the testator intended they should enjoy.

It is objected that there is no capable or competent party to institute proceedings in chancery to have the charity established and executed. Our answer is that the trustees could have done so. Any poor white citizen of Kent County can do so for himself and the other poor of the County. The Attorney General, of his own mere motion, or upon the information of others, is competent to bring the charity before the Court; and then the Court, as matter of right and duty peculiarly belonging to its jurisdiction, will take upon itself the execution of the trusts. 1 *Ves. Jr.* 464–475; 3 *Bro. Ch. R.* 517; 7 *Ves. Jr.* 36; 2 *Shelf. on Mort.* 42, 44, 45.

It is a matter of no moment how the subject gets before the Court, or at whose instance; if it be a charity without trustees to administer it, the Court will take charge of it, without reference to the fact

of who is the complainant. 2 *Kent's Com.* 286–288; 7 *Paige R.* 77. The trustees of the poor might be the complainants. *West vs. Knight*, 1 *Ch. Cas.* 134. A bill might be filed against the Attorney General and the heirs. *Powell vs. Atty. Gen.* 3 *Mer. R.* 48. The *mode* of distribution is not important; the charity is the substance. 2 *Sto. Eq. Jur.* § 1167.

The case of *Dummer vs. The Corporation of Chippenham*, 14 *Ves. Jr.* 245, was a charity for the education of twelve poor boys, the support of a free school, and provided for the appointment of their schoolmaster by the bailiff and burgesses. The complainant was appointed by the bailiff and burgesses of the corporation. He filed his bill to have the charity established in his favor, and it was so decreed.

Suppose the agents of the Levy Court of Kent County were to make a selection and appointment of certain *poor white citizens of Kent*, could not they file their bill to have the charity executed? The case is precisely similar to the above.

In the case of the *Atty. Gen. vs. Mayor of Dublin*, 1 *Bligh, R.* 347, the Lord Chancellor says, "the right which the Attorney General has to file an information is a right of prerogative. The king as *parens patriæ* has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects, who are incompetent to act for themselves, as in the case of charities and other cases."

The State has a right to do the same thing, through her proper officer, *i. e.*, to see that justice is done to her citizens.

A gift or bequest to "charity" generally is good, though the objects to be benefited are uncertain and unknown and the disposition of the charity, by the English law, if there are no trustees named, is in the King, who administers the same through the Court of Chancery. And where the execution is to be by trustees, with general or some objects pointed out, there the Court will administer the charity in virtue of its original power. *Moggridge vs. Thackwell*, 7 *Ves. Jr.* 36 *to* 87; *Atty. Gen. vs. Hickman*, 1 *Eq. Ca. Ab.* 193; 1 *Jarman on Wills*, 218–219.

Where no objects or class of objects is pointed out, and no trustee named, as in a bequest to "charity" generally, then the disposition is in the king, and is administered by chancery. 2 *Lev.* 167;

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Amb. 712. But if the objects, or class of objects,is pointed out, there the trustee ; or, if there be no trustee or if he refuse to act, a court of equity will administer the trust. 7 *Ves. Jr.* 87.

A gift of the interest of £4200, to "*the poor inhabitants of St. Leonard, Shoreditch,*" *Atty. Gen. vs. Clark, Ambler* 422, is a good charity,such as chancery will administer ; and,in doing so,it will construe the bequest to mean the *uncertain* poor of the parish not receiving alms under the poor rates. See also *Waller vs. Childs, Amb.*, 524; *Atty. Gen. vs. Herrick, Amb.* 712 ; *Shelf on Mort.* 628, 629 ; 3. *Russ. R.* 395 ; 2 *Bro. P. C.* 370 ; 7 *Bro. P. C.* 235.

Uncertainty of individual objects at the time of the gift, is characteristic of charity. If the beneficiaries are *ascertained* and *individualized* by the donor, it is a mere trust in a restricted sense, and not a charity. If it is a charity, no matter how uncertain it may be, chancery will protect it.

"It is settled," says Sir Wm. Grant in the case of *Morrice vs. The Bishop of Durham,* 9 *Ves. Jr.* 404, upon authority which it is too late to controvert, that, where a charitable purpose is expressed, *however general,* the bequest shall not fail on account of the *uncertainty of the object.* The Court of Chancery will exercise control *over every species of trust.* If it be a *mere trust* (not charity) but to *uncertain objects,* the property is undisposed of and will go to the heir at law. But this doctrine *does not hold good with regard to trusts for charity.* 7 *Ves. Jr.* 36 ; 1 *Meriv.* 98 ; 2 *Shelf on Mort.* 514, 518 ; 1 *Powell on Dev.* 215, 366, *note* 1.

The same words in a will, when applied to the case of *individuals,* may require a different rule of construction from that which would govern in the case of a charity. 2 *Shelf on Mort.* 519 ; 9 *Ves. Jr.* 404.

To give effect to a bequest in favor of a charity the Court will not only supply the place of an executor or trustee, but will give such construction to the will as will carry into effect that which, in case of individuals, would have failed altogether. 7 *Ves. Jr.* 36 *to* 87 ; 1 *Meriv.* 98. In 2 *Shelf. on Mort.* 519—522, neither trustees nor objects are named, but there is a reference to a further appointment not made.

A devise "to the cause of Christ" for the promotion of evangelical piety and religion was held a good devise in Massachusetts. *Go-*

ing vs. Emery, 16 *Pick. R.* 107; so also a bequest to A. B. and C. and survivors &c. for the use of the "Board of Foreign Missions" was held valid. *Bartlet vs. King*, 12 *Mass. R.* 537. So too, a bequest to the "American Bible Society," and to the "American Education Society," and to the "American Colonization Society." *Burbank vs. Whitney*, 24 *Pick. R.* 146; *Bartlet vs. Nye*, 4 *Metc. R.* 378. The whole law of charities in this country is fully set forth, and the jurisdiction of chancery fully sustained, in the case of *Sarah Zane's will*, to wit: *Magill et al. vs. Brown*, which was decided by Baldwin, Justice, in the Circuit Court of the United States. See also *Burr's Ex'rs vs. Smith*, 7 *Verm. R.* 241, and *Vidal et al. vs. The City of Philadelphia*, 2 *How. S. C. R.* 127.

The case of *Baptist Association vs. Hart's Ex'rs* has been fully overruled. *Bartlet vs. Nye*, 4 *Metc. R.* 378; *Burr's Ex'rs vs. Smith*, 7 *Vern. R.* 241; *Vidal vs. Philadelphia*, 2 *How. S. C. R.* 127; *Potter vs. Chapin*, 6 *Paige R.* 649; *Dutch Church vs. Mott*, 7 *Paige R.* 77. All grants, devises and bequests *to charitable uses* were good at common law. *Vaughn*, 356. All grants, devises and bequests in mortmain were good at common law. *Vaughn*, 356; *Coke on Litt.* 989; *Report of Sarah Zane's will case*, 17.

There is no statute of superstitious uses or of mortmain in this State. These statutes are in derogation of the common law, are extremely penal, imposing *forfeiture*, and they have never been adopted here.

The Statutes of Mortmain, prior to 43 Elizabeth, are 9 Henry III ch. 36; 7 Edw. I; 13 Edw. I; 15 Rich. II; 23 Henry VIII ch. 10.

These Statutes never were in force here, because our ancestors brought over only *such laws as were useful to their new situation*. *Sarah Zane's will case*, 12. If they brought over any of these Statutes, it was the 43 Elizabeth, the principles of which are useful, and consonant with the spirit of our institutions and policy. And yet it is generally conceded that the 43 Elizabeth is not in force. Surely then, if this useful Statute has not been adopted, the mortmain acts, which are in derogation of the common law, and are so repugnant to the spirit of our institutions, have not been adopted.

The Statute 9. Geo. II does not apply to this country. The object of the act was wholly political, and so framed as to be quite inapplicable to any of the colonies. For, as observed by Sir Wm. Grant, "in its causes, its objects, its provisions, its qualifications, the act is a law wholly English, calculated for purposes wholly local,

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complicated with local establishments, and incapable, without great incongruity in the effect, of being transformed to the code of any other country." *Atty. Gen. vs. Stewart*, 2 *Meriv.* 143; 1 *Shelf. on Mort.* 122.

No act made after a colony is planted is construed to extend to it without express words, showing the intention of the Legislature to be that it should. *Rex. vs. Vaughan*, 4 *Burr. R.* 2500; 2 *Meriv.* 156, *note* (*a*).

The 9 Geo. II. does not apply to Ireland. *Atty. Gen. vs. Power*, 1 *B. & B.* 154; nor Scotland, *Mackintosh vs. Townsend*, 16 *Ves. Jr.* 338. It is not in force in Pennsylvania. Baldwin J. in the case of *Sarah Zane's will, pp.* 32, 33, 34.

No act of Parliament extended to the colonies, unless adopted by act of assembly, judicial decisions or established usage. *Morris vs. Vanderen*, 1 *Dallas* 67; *Respub vs. Mesca*, 1 *Dallas* 73. One of our statutes in its preamble (1 *Del. Laws* 64) recognizes this principle. It recites that " Whereas acts of Parliament have been adjudged not to extend to these plantations except when they are particularily named in the body of such acts," &c.

Our Statute of Mortmain is confined to " religious societies of protestants." *Digest* 447. It is similar to the law of Pennsylvania.

There is no such thing as an established church in the United States; no such thing as toleration where there is universal liberty of conscience. And, for the same reason, there is no such thing as a *superstitious use;* for all religious denominations are equal in the eye of the law, and equally entitled to favor and protection. The whole system of English legislation, therefore, is altogether inapplicable to this country.

What is charity? In a *limited sense* it is liberality to the poor, consisting in alms-giving or benefactions, or in gratuitous services to relieve them in distress. In a *general sense*, it is love, benevolence, good will—that disposition of heart which inclines men to think favorably of their fellow men, and to do them good. In a *religious sense*, it includes supreme love to God and universal good will to men.

From what source is the law of *charity* derived? Some say from the civil law. But it has a higher origin; it is derived from the

law of God; it is part and parcel of the christian religion. Wherever christianity took root and flourished, there the law of *charity* flourished with it.

The natural and revealed will of God is a part of the common law of England. 1 *Black. Com.* 42, 43. It is not natural to inquire *when* or *how* it became a part of the common law of England. It is enough to know as we do know, that it *is* part of the common law, and that it was such centuries before the Statute 43 Elizabeth. And since the law of charity was a part of the christian religion, and the christian religion a part of the common law of England, how can it have originated with the 43 Elizabeth or be dependent upon that Statute for its efficacy.

Is the law of charitable uses the law of this country?

The answer is that our ancestors brought over with them the whole body of the law of England as it then existed, which was upwards of eighty years after the 43 Elizabeth.

Can it follow that they did not bring with them this law, or at least the principles and spirit of the law?

At all events they brought over with them the common law, which included the whole law of charitable uses. 1 *Del. Laws* 64. Equity is a part of the common law.

The common law of charitable uses has been recognized by decisions as existing in Massachusetts, Vermont, Connecticut, New York, New Jersey, Pennsylvania, North Carolina, Ohio and Kentucky. The decisions in these states maintain and establish the doctrine that there is a common law of charity, which existed antecedently to and independently of the 43 Elizabeth.

This law as to charities came over with our ancestors. It has been recognized by the decisions of Pennsylvania as having existed in that State from the time of its first settlement by the English under William Penn, in 1682.

Now, Pennsylvania and Delaware were colonized at the same time, by the same people, who brought over the same law—the common law—their birth right, 1 *Del. Laws* 64; and they were subject to the same government.

This law of charity—it is the law of God; it is part of the common law; it was the law of the colonists; as such it became and has

ever been the law of Pennsylvania. Why then did it not become the law of Delaware? Clearly, it was our own common law when we became a Colony. Why then is it not our law now that we have become a Sovereign State?

By the Act of Union passed in 1682, (1 *Del. Laws, App.* 9), for annexing and uniting the three lower counties, it is expressly provided that "the people of the three lower counties shall be governed by the same laws and enjoy the same privileges in every respect as the inhabitants of Pennsylvania do or shall enjoy from time to time therein."

The law of charity in its fullest and broadest extent, has ever been and now is, the law of Pennsylvania; therefore, it must be our law.

We have shown that the law of charitable uses is a part of the common law of England, and that it has ever been such. By Art. 25 of the Constitution of 1776 (1 *Del. Laws, App.* 89) the common law of England is declared to be the law of this State; and also, so much of the statute law as has been heretofore *adopted in practice* in this State is declared to be the law of this State. Who ever heard of the 9 Geo. II, or any other English mortmain law, having been *adopted*, not in theory, but in *practice*, in the State of Delaware.

We maintain, that the "poor white citizens of Kent County" are entitled to the charity; that they have a property in it which is recognized by the law; and that, according to the language of the Bill of Rights, they ought to have remedy by due course of the law of the land, and ought to have justice and right for injury done to them freely and without sale, fully without any denial, and speedily without delay. 1 *Del. Laws, App.* 80, *Sec.* 12.

Our Court of Chancery is invested with power "to hear and determine all matters and causes in equity," 1 *Del. Laws* 130. It possesses full equity jurisdiction, as defined in 1 *Story Eq. Jur. sec.* 57. Its jurisdiction extends to all trusts, and, of course, to charities which are trusts. It is bound to execute the trusts of Mr. Potter's will.

We come now, in conclusion, to notice briefly the attempt to apply the doctrine of perpetuities to this case.

This doctrine has no application whatever to charities; and never has, before this case, been even suspected of being applicable to this subject. *Lewis on Perpetuity* 689, *margin*. It is the fact that a charitable use may be permanent and perpetual that distinguishes it from gifts to individuals.

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The trust established in the "Shakers' Covenant" was held not to be void as being a perpetuity. *Gass vs. Wilhite*, 2 *Dana. R.* 170. The same principle has been decided in *Griffin vs. Graham*, 1 *Hawkins' R.* 96, and in the case of *Inglis vs. Sailors' Snug Harbor*, 3 *Peter's S. C. R.* 99.

The case of *Wiltbank's adm'r*, 1 *Harring. R.* 18, was much relied on, as shewing that the English doctrine of charitable uses is not in force in this State. But that case decides only one point, *i. e.*, that the trustees of the church, not being a corporate body, could not take the fund; and, moreover, that the devise was in contravention of our Statute in relation to religious societies. The case does not touch the question of equity jurisdiction over charitable uses generally.

J. A. Bayard, for the heirs at law, in reply.

I. Our first ground, and one which is decisive of the present case, is that, apart from and independent of the the Statutes of 39 and 43 Elizabeth, the Court of Chancery had no authority and exercised no jurisdiction to enforce charitable uses, except on the general principles applicable to other trusts; and that the jurisdiction, as now exercised in England, arose by usurpation under those Statutes, though it has since been referred to the ordinary jurisdiction of the Court.

We adhere to the position that, as a matter of judicial history, the Court of Chancery, prior to the Statute of Elizabeth, did not take jurisdiction to enforce charities vague and uncertain--charities limited to objects too uncertain to take as *cestuis que trust*; nor did the Court then supply defective conveyances to charitable uses. This conclusion was reached, upon the soundest reasons, in the elaborate opinion of Marshall, C J in the *Baptist Association case*; and it is needless to do more than to refer the Court to the reasoning of that case. Against this position reliance is chiefly placed upon the large number of early cases, prior to the Statute, which were cited by Mr. Binney in the Girard will case, and which seemed much to have influenced the mind of the Court in that case. But the just inference from those fifty old cases is that an attempt was made to establish a jurisdiction over indefinite charitable uses, which failed because it was so utterly inconsistent with the principles of law; and that

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gave rise to the Statute of Elizabeth. We admit that charitable uses did exist and were enforced previous to the Statute, as were other uses; but, if they were void at common law, either as defective conveyances or because they were limited to persons too uncertain to take as *cestuis que trust*, the court had not jurisdiction to enforce them; and the Statute was passed to confer the necessary jurisdiction. If there was no such necessity, why, it may be asked, was the Statute passed? It is said that its object was to vest a more convenient jurisdiction in commissioners. We deny it. The jurisdiction under that Statute was given to the Chancellor. He appointed the commissioners and modified and controlled their decrees. See the Statute at large; *Duke* 1; *Porter's case*, 1 *Co. R.* 22-4. Again, how is the existence of such a jurisdiction, prior to and independent of the Statute, to be reconciled with the undeniable fact that, after the Statute was passed, it was, to so large an extent, made the ground for sustaining gifts to charity which were void at common law? Cases of this description are almost numberless. *Duke* 355–6, 362—395. Among the cases cited by Duke see *Davis' case*, *Rivet's case*, *Christ Church Hospital*, and *Holt's case*. It further confirms this view of the effect of the Statute that in England charity is a word of technical meaning, not to be confounded with charitable or benevolent purposes in the general sense, but is confined to such purposes only as are recognized by the Statute. Hence, gifts to private objects of charity, or to individuals merely as objects of benevolence, are not aided or enforced, if defective or uncertain, though gifts to repair a highway or for a school will be, because these are among the objects enumerated in the Statute. 9 *Ves. Jr.* 403; 10 *Ves. Jr.* 520, 539; 1 *Mer.* 85; 3 *Mer.* 17; 1 *Turn. and Russ.* 260; 1 *Sim. and Stu.* 69, 71.

I am aware that some judges have asserted the inherent, original jurisdiction of Chancery over charities. But these are *dicta*, and though coming from learned judges are not to weigh against the clear historical facts.

II. But, whatever sort of jurisdiction as to charitable uses may have existed prior to the Statute of Elizabeth, it is certain that the English doctrine of executing charitable uses *cy pres*, as it is termed, arose solely under that Statute, and is confined to such charitable uses as are enumerated in the Statute or to analogous cases. Under that doctrine where, in cases within the Statute, either the particular

charity indicated by the donor fails from any cause, or cannot be carried into effect in the manner or by the means appointed by the donor, or when the gift to charity is general, with no specification of any particular charitable use, the general purpose of charity should be carried into effect by means of a scheme reported by a master or by authority of the crown under the sign manual. In such cases the proceeding was by information in the name of the Attorney General. After the Statute this proceeding by information by the Attorney General was found more convenient, and the proceeding by commission provided by the Statute fell into disuse. See 2 *Black. Com.* 375; *case of Sarah Zane's will*, 17.

It is a fact, of much significance on this point, that no case can be found, where the Attorney General was made a party to enforce an indefinite charity, earlier than the year 1675. All the old cases cited in Mr. Binney's argument in the Girard will case were between private parties. *Atty. Gen. vs. Mallory*, 2 *Levinz* 167, is the first case in which the Attorney General ever sued. Another fact, equally significant, is, that informations by the Attorney General were not filed in cases not within the Statute, though they might be for objects of charity in the general sense. 2 *Vernon* 387.

III. Neither the forms nor principles of the doctrine of charitable uses as it is held in England, whether arising under the Statute of Elizabeth or otherwise, have ever been adopted in the State of Delaware, either while a Colony or as a State, nor have been recognized by usage, judicial decision or legislative enactment.

The Colonies carried with them such laws as were suitable to their condition, and none others. 3 *Binn. R.* 596, *App.*; *Constitution of Del. of* 1776, *Art.* 25; *Constitution of* 1792, *Art.* VIII, *Sec.* 12. The English doctrine of charitable uses was founded upon a policy unknown in our Colonies. It was that policy which grew up in the reign of Henry VIII, of keeping up an established church and aiding it in its temporal possessions. Our Colony never imported any established church, and the doctrine of charitable uses, which was designed to support such a church, became unnecessary here.

We do not mean that our policy has been adverse to the encouragement of colleges, schools, poor houses, hospitals and other institutions for charitable purposes, but that the establishment of these and the determination of the proper objects of such institutions and of the

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means of supporting and conducting them are with us wisely left to legislative enactment and control and not to individual caprice, as under the English system. Such a system, if extensively introduced here, would be prejudicial to the public interests, by accummulating large bodies of property in few hands and leading to the growth of a power beyond public control. For the experience of society has shewn that property and power cannot be divorced.

It may be considered that there are three modes in which charitable uses may exist in a state or commonwealth, as legally or equitably enforceable;—1. By the authority of the state, using its own means and exercising its direct control through its appointed officers exclusively.—2. Partly by institutions founded by or under the exclusive control of the state, as just mentioned, and partly by institutions and foundations established by the gifts of individuals and administered according to the will of the donor, where special authority has been given by the legislature for establishing and carrying into effect the gift, either by incorporation or other enactment, with a full knowledge of the use intended and with an acknowledgment and sanction of its propriety and benefit to the community.—3. The third condition under which charitable uses may exist is the English system, now under discussion, where they are left to be established not only upon private endowments, but for such ends and upon such methods as individual will or caprice may dictate, without the interference or regulating supervision of the legislature, and without its sanction or admission, as the *parens patriæ*, that the use intended will be beneficial to the community and consistent with the public policy.

The second condition of charitable uses is believed to be the one most consistent with the policy and law of this State, as evidenced by the usages of our people and the general course of our legislation. It will also be found to be the soundest and most rational in principle, and most accordant with institutions based upon the will of a majority of all the members of the community as men, irrespective of property, and having an equal and common interest in the good government of the state.

It may be true that in Pennsylvania these charitable institutions, resting upon private endowments and independent of legislative supervision and control, have always largely existed, and that they

have been favored under the laws of that State. This fact was a potent argument in the *Girard will case*, in support of the English doctrine as in force in that State. The same fact and our early historical connection as a State with Pennsylvania have been strongly relied on by our opponents in this case, to support the recognition of the same doctrine of charitable uses here. But it should be remembered that Delaware was a well settled colony before Penn came to Pennsylvania; and that, although the two colonies were united for a time, they separated as early as 1701, and before any system or policy in relation to charitable uses had obtained in the two united colonies. And, as in many other respects, so in this,the colony of Delaware, adopted a policy in relation to public charity wholly different from that of its sister colony. If the long existence in Pennsylvania of a system of public charities in harmony with the English doctrine is an argument in favor of the doctrine as in force in that State, certainly the absence of such a system of public charities in Delaware, is an equally strong argument against the introduction of that doctrine into this State.

We have had, as yet, no judicial decision touching this question, except the *Wiltbank case*, 2 *Harring. R.* 18, which has already been brought fully before the Court. Though not a direct decision upon the question it strongly implies the absence of the English doctrine of charitable uses. For, in that case the use, viz: the education of poor children of a church, was a good use, and such as the English Court of Chancery would unhesitatingly have protected, notwithstanding the failure of a trustee from any cause whatever; and yet our Court held that because the trustees of the charity in that case, being a religious corporation, could not, under our statutes, hold the property for such a use, the use must wholly fail. The English doctrine was, in that case, strongly urged by the counsel for the charity in order to save the use. It was argued that the great qustion was, "not who is the trustee but what is the use," that "if the use be good, the Court will enforce it and provide a trustee." Yet the Court suffered the use to fail; and,though not so expressing itself in terms, must have considered that our Court of Chancery had not the power to execute indefinite uses of that nature.

There has been no judicial authority in our state history of more weight, on such a subject, than that of the late Chancellor Ridgely,

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one of the ablest equity judges of this or of any other country; and it has always been understood as his opinion that the English doctrine of charitable uses, and particularly the doctrine of *cy pres*, never was in force in this State.

IV. I now proceed to another gene:al position. Whether or not the Statute of 43 Elizabeth is held, in its principles, to be in force in this State, or those principles are referred to the general jurisdiction of chancery, still the power to enforce a charity, where there are no designated individuals capable of suing for their rights and having a sufficient interest to call upon the Court for their protection, is a branch of *the prerogative power of* the Crown, which by the Revolution passed to the State, but which has never been delegated to or exercised by the Court of Chancery in Delaware. It, therefore, follows that, although in England the Attorney General, representing the King, may file an information to enforce a charity where there is no one capable of taking or enforcing the gift, yet the Attorney General in Delaware has no such power; nor does the Court of Chancery represent the prerogative of the Crown as *parens patriæ*; but this prerogative has devolved upon the legislature, and can be exercised only under its authority.

The English theory is that the King, as *parens patriæ*, superintends all charities, upon the same principle on which he is the protector of infants and lunatics; and he enforces them through the Attorney General,as his officer,by an information. In all such cases, where there is no person sufficiently ascertained to call for protection under the general equity jurisdiction of the court, the Attorney General is a necessary party,and the Chancellor exercises jurisdiction as the delegate of the Crown. In some instances the charity is administered by a scheme reported by a Master; but in other cases resort is had to the King's sign manual. 1 *Sim. & Stu.* 40; *Shelf. on Mort.* 283, 427; 7 *Ves. Jr.*, 85, 86.

In this State the prerogatives of the Crown devolved upon the people; and by the Constitution the people have vested this branch of it in the legislature. It is undoubtedly, part of the legislative power of the State. *Case of Sarah Zane's will*, 17. Jurisdiction over certain subjects of this prerogative, has been expressly conferred by the legislature upon the courts; as in the case of infants and lunatics. The care of infants has been given to the

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Orphans' Court, and of lunatics to the Court of Chancery; but as to the other subject of the royal prerogative, charitable uses, the jurisdiction has been vested nowhere. On the Court of Chancery, our statute confers only ordinary equity jurisdiction; and the proceeding must be by bill and answer. *Constitution of* 1792, *Art.* VI., *Sec.* 14. Judicial power alone was delegated, and no power of prerogative. Had the Court of Chancery, as such, been considered as invested with the powers exercised by the Crown as *parens patriæ*, there would have been no occasion to confer upon it by statute the charge of lunatics, nor upon the Orphans' Court the charge of infants.

From this condition of the law of this State, as to charitable uses, it results that, in the absence of parties having an ascertainable and individual interest in a charitable use, and of any delegation of authority by the *parens patriæ* to enforce the charity for an indefinite class, there being *a trust*, whether of goods or land, it must result in favor of the next kin or heir at law, *until* the legislature, as *parens patriæ*, shall give to the court authority to carry the trust into effect as a charitable use.

V. There remains another question, which may be briefly noticed. Is this particular devise a charitable use, capable of being enforced in equity, according to the English doctrine, even supposing that to be in force in this State?

The English decisions admit that only uses of a public nature, such as are specified in the Statute of Elizabeth, or analogous to these, are enforceable as a charitable use; that a gift for *private charity*, if not enforceable upon the general principles applicable to trusts, cannot be sustained under the doctrine peculiar to charitable uses, but results for the benefit of the next of kin or heir at law. "A charitable use, 'says Lord Camden,' is a public institution for a public purpose." Objects of mere private benevolence, not extending to public interests, have been held not to be relieveable under the Statute. *James vs. Allen*, 3 *Mer.* 17; *Ommaney vs. Butcher*, 1 *Turn. & Russ.* 260, (11 *Eng. Ch. R.*)

I admit that if this devise in Col. Potter's will had been for the maintenance of the poor of Kent County, without the restrictions connected with the devise, the English Courts might have enforced it as a public charity, by founding an alms house or other public

institution according to some scheme of its adoption, looking to the permanent and public relief of the poor as a class. But such a scheme would defeat the expressed intent of this testator, who evidently looked to individual relief by private charity, so as to prevent the necessity, which he was careful to exclude, of throwing the persons relieved upon any public institution, such as an alms house.

VI. Our last objection to the devise in controversy is founded upon the English Statute of 9 Geo. II, c. 36, the policy of which we hold to be in force in this State. That Statute was passed to remedy the mischiefs which had resulted from the extravagant length to which the English doctrine of charitable uses, had been pressed. It prohibited gifts of lands, or money to be laid out in lands, for charitable uses, except by deed executed twelve months before the death of the donor.

It is true that the Statute of 9 Geo. II, may not, by its own force, have operated directly upon the colonies of Great Britian; nor has it been expressly re-enacted in this State. But it was a statute passed long before the Revolution, and was one of those statutes affecting the body of the common law, which, being suited to the condition of the Colony and in harmony with the habits and policy of our people, must be taken to have been adopted by them. This is unquestionably true of other English statutes, passed as late as the reign of Geo. II. As an example, our law of set-off was founded upon a Statute of Geo. II. Our act respecting religious societies, 17 Geo. II, affords strong evidence that the policy of the Act of Geo. II. was considered then in force in this State. The Act of 17 Geo. II. was an *enabling* Statute, passed to enable religious societies to take and hold lands for certain uses, religious and charitable, such as for houses of worship, burying grounds, *school houses and alms houses.* To what purpose was this enabling act, if these societies had such power previously? And if these societies had not, without the Statute, the power to take and hold lands for charitable uses, how could the power be considered to exist in other societies or persons? Is it to be supposed that a non-religious body could take land in perpetuity to establish a charity when religious societies could not, without a special enabling act, do the same thing? Was the act founded upon a previous policy of hostility

to religious societies? Or was it not rather designed to except them, so far as it went, from the operation of a previous general policy. Then followed our Act of 1787 for incorporating religious societies in this State (*Del. Dig.* 459) which contains a provision bearing to the same conclusion. By section 3 "all gifts, grants, bargains, sales and conveyances" (to such religious societies)" of and for any messuages, lands, tenements, rents and other hereditaments, corporeal or incorporeal whatsoever, and of and for any sum or sums of money, goods, chattels, stocks in any public funds, securities for money &c., to be laid out or disposed of in the purchase of any lands, tenements, rents or other hereditaments," should after the passing of that act be made by deed executed twelve months before the death of the grantor &c. The effect of this section was to prohibit devises to religious corporations, in substantially the same terms with the English Statute of 9 Geo. II. We hold this provision to be but an application, in express and definite terms, of a previously existing policy, adverse to devises in perpetuity—a policy which forbade such devises either to religious or charitable uses. The insertion of such a restrictive provision in the Act of 1787 had its use and effect in preventing the general power to take and hold lands under the incorporating clause from operating to make religious corporations an exception to the general policy. Our final position, therefore, is that by the laws of Delaware, a devise of lands, or money to be laid out in lands, in perpetuity, to either a religious society or individuals for either a religious or charitable use, is void; and that no gift of lands, or of money to be laid out in lands, can be made, either to a religious society or for their use, or for a charitable use, except in the mode allowed in the third section of the act of 1787.

The case was held under advisement until the June Term 1849, when

WOOTTEN, J., delivered the unanimous opinion of the Court, as follows:

Benjamin Potter, the testator, by his last will and testament, bearing date the 26th day of June, 1839, and by sundry codicils thereto, after disposing of and giving certain portions of his estate to his relatives and friends, devised all the balance or residue of

Opinion :—questions stated.

his estate, real, personal, and mixed, of every description, to Potter Griffith, George S. Atkins and Levin H. Adams, in trust for the support and maintenance of the poor white citizens of Kent county, "who by timely assistance might be kept from the Poor House and from becoming inmates thereof," excluding from the benefit of any part of his bounty, all such persons as might be within the walls of the Poor House; and further directing his real estate, passing under this devise, to be rented by his executors, and the net proceeds applied to and for the purposes above mentioned, "by agents to be appointed by the Orphans' Court or Levy Court of Kent county, as might be deemed most proper."

The questions presented by the case stated are whether the devise so made, in and by the 18th item of the said last will and testament and the several codicils thereto, unto and for the charitable uses, objects and purposes in manner and form set forth in the case stated, are valid and capable of being sustained and carried out in a court of chancery, according to the rules and principles of a court of equity; or whether the same are void or illegal, and not capable of being sustained and carried out in a court of chancery, according to the rules and principles of equity.

The important principles of law which are applicable to the subject matter of this suit, have been the subject of much labor and research, and have elicited a vast amount of legal learning; and much has been displayed in the argument of this cause. Therefore, although we by no means look upon this case as one free from difficulty and obscurity, yet in its adjudication we are not left entirely in the dark, without a light or beacon to guide us; but our pathway is lighted up by the opinions and decisions of some of the ablest jurists that ever adorned the Bench, as well of this country as of that from which we derived our code of laws.

Assuming the fact, which is conceded in the argument, that the testator designed by this devise to create a trust for charitable uses and purposes, and that he employed proper and suitable language to convey the legal estate to the trustees, we proceed to the consideration of the respective questions presented by the case stated and the arguments in the cause.

It can scarcely be necessary to do more than merely glance at the objections made to the validity of this devise on the ground that

there are no trustees to execute the trust. The trustees designated and appointed by the testator may, it is true, decline and refuse to execute the trust; but we are at a loss to conceive on what principle such refusal can divert the fund from the legitimate objects of the trust, and thus defeat both the will of the testator and the charity. It is a principle too well settled to require the aid of reasoning or argument at the present day, that a valid trust shall never fail for want of a proper trustee. 2 *Sugd. on Powers* 174; 1 *Chancery Cases* 180; *Coke on Litt.* 190 *b.* 4. *Sec.* 4. It is a general principle of equity that wherever may be the legal estate, if the trust is valid, it will be protected and enforced in a court of equity. It is also a general rule, that a legacy given in trust does not lapse by the death of the trustee in the testator's life time, but survives for the benefit of the *cestui que trust.* The substance of the charity remains notwithstanding the death of the trustee in the testator's lifetime, though at law the legacy lapses. *Shelford on Mortmain*, (36 *Law Library*) 367. It is sufficient that the trust appears; and if the party creating it does not appoint a trustee to execute it a court of equity will follow the legal estate and decree the person in whom it is vested, a trustee to execute the trust. *Ambler's R.* 571; 1 *Bro. Ch. Rep.* 81. Lord Coke says, it is a rule of equity, which admits of no exception, that a valid trust shall not fail for want of a trustee to execute it; but a court of equity will execute the office. *Coke Litt.* 113 *a, note.* Trusts are often created by will without the designation of any trustee to execute them; or it may be matter of doubt upon the terms of the will, who is the proper party. But a court of equity will not hesitate, where doubts exist as to the party, to declare who is the proper person to execute the trust; and, where no trustee is designated, it will proceed to execute the trust by its own authority. 2 *Story's Eq. Jur. sec.* 1059; 1 *Ves. Sr. R.* 475.

It is said, however, that the objection to the validity of this devise is rather on account of the uncertainty of the *cestuis que trust* than for the want of trustees; and it is insisted that the description of the beneficiaries is so vague and uncertain that, even if there were a power of selection appointed, the devise must fail as a trust.

The class of persons intended to be the recipients of the testator's bounty are described by him as the "poor of Kent County, who by timely assistance may be kept from being carried to the Poor House and becoming inmates thereof;" And the testator directs the distri-

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bution of the fund "to be made by agents to be appointed by the Orphans' Court or Levy Court of Kent County, as may be deemed most proper."

Is this description of the beneficiaries so vague and indefinite that they cannot be selected and ascertained by the agents who were to be appointed by the Orphans' Court or Levy Court? Are they not as susceptible of ascertainment as "the poor inhabitants of Saint Leonard Shoreditch," in the case of *Atty. Gen'l vs. Clarke, Ambler's Reports*, 422? This was a bequest of the interest of £4200, of bank annuities, to "the poor inhabitants of Saint Leonard Shoreditch;" and it was insisted by the defendants that the bequest was void for uncertainty in the description of the persons to take; but the bequest was sustained and the fund distributed among the poor inhabitants not receiving alms. The description in this case was much more general than in the one now under consideration, but the distribution of the fund was confined to the poor of Saint Leonard Shoreditch not receiving alms; for, without such restriction, it was said the rich as well as the poor would be benefited, which could not have been the intention of the testator.

In this case Col. Potter restricts the distribution of the fund to the poor of Kent County who by timely assistance may be prevented from becoming inmates of the Poor House; and he expressly prohibits the bestowal of any part of his bounty upon any persons not within this description, or who are inmates of the Poor House.

A bequest was made for the benefit of the poor dissenting ministers of the gospel residing and living in any of the counties of England, to be paid to the treasurer of such charitable society or fund for the time being, for that purpose, as the major part of them should direct or appoint. It appeared that there were three distinct societies of dissenters, and that collections were made for the poor ministers of each. It was held that the bequest was not void for uncertainty; but that the fund should be distributed to and among the poor ministers of each society. *Walter vs. Childs, Ambler's R.* 524.

The beneficiaries are said to be further uncertain, because no effectual provision is made by the testator for their selection; and in support of this objection it is argued that under the provision made by the testator the power of selection is vested nowhere; that it does not exist solely in either of the courts named, nor in both collectively; and, therefore, it is contended, that neither can make

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the appointment of the agents who were designed to be the instruments of distribution; and consequently no *cestuis que trust* can be brought into being and invested with rights to be asserted in a court of equity. If this argument is tenable, and it is true that a power vested in any one of two or more persons is not sufficient authority for the action of either, by what authority did the late Court of Common Pleas and Supreme Court of this State exercise concurrent jurisdiction? As well might it be said that the authority to take the acknowledgment of deeds no where exists, because such authority is not conferred upon one particular officer or class of officers, but is delegated to several. But if both the Orphans' Court and Levy Court should neglect or refuse to appoint such agents as the testator designated and provided for by his will, would such neglect or refusal defeat the general intention of the testator and deprive the objects of his bounty of the benefit of the charity? Or, would it not come within the province of the Court of Chancery to supply the defect thus occasioned in the mode prescribed by the testator for the execution of the trust, by creating an agency to effect the distribution of the fund in accordance with the will of the testator? The agents are the mere instruments of distribution—the hand, as it were, to parcel out the fund and carry into effect the general intention of the testator, which, being charity, will not be allowed to fail from the neglect or refusal of the trustees to execute the trust or from the neglect or refusal of the Orphans' Court or Levy Court to appoint the agents to distribute the fund. *Atty. Gen. vs. Boultbee*, 2 *Ves. Jr.* 380; *Atty. Gen. vs. Syderfen*, 1 *Vernon* 224; *S. C.* 7 *Ves.Jr.* 43; *Mills vs. Farmer*, 1 *Mer.* 55. In these cases the object of the charity and the persons to designate it were both wanting; yet the defects were supplied and the general intention of the testator, which was charity, carried into effect.

In the case now under consideration the devise is not so general; but the testator designated and described the objects of his bounty and marked out the plan by which it was to be distributed. The principle which governed the cases just referred to, therefore, applies *a fortiori* to this case; the appointment of the agents, merely, to effect the distribution of the fund in the mode and to the persons designated and described by the testator, being the defect sought to be supplied by the aid of the Court of Chancery.

The argument against validity of this devise for want of certainty

Opinion:—uncertainty of objects no objection to a charity.

in the beneficiaries seems to be based on the assumption of the fact that personal gifts and bequests to charity are of the same character and governed by the same principles of law; whereas I apprehend there is a manifest distinction and that the principles which govern the one class of cases are wholly inapplicable to the other. Bequests to charity seem to be an exception to the general rule laid down in reference to personal or individual gifts; and the very authority cited at the bar and mainly relied on in support of this objection to the devise fully sustains this position and illustrates the principle which marks the distinction between the two classes of bequests. In *Powell on Devises* (21 *Law Library*,) 215. *n* 7 (which is the authority just alluded to) it is said by Sir Wm. Grant, in reference to gifts void for uncertainty, that an exception should be stated, applicable to bequests to charity, with respect to which "it is now settled upon authority, which it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object, but the particular mode of the application will be directed by the King in some cases, in others by the Court of Chancery." *Morice vs. Bp. of Durham*, 9 *Ves.* 405. Here a number of authorities are cited illustrative of this principle, some of which are very similar to the case now under consideration; as the case of a gift to the poor in general, *Atty. Gen. vs. Matthews*, 2 *Lev.* 167; *Atty. Gen. vs. Clarke*, *Amb.* 422; *Bishop of Hereford vs. Lady Twysden*, 7 *Ves.* 324; *Paice vs. Archbishop of Canterbury*, 14 *Ves. Jr.* 364; or, a gift to charitable uses generally, *Clifford vs. Francis*, *Freem. Ch. Cases*, 330; *Atty. Gen. vs. Herrick*, *Ambler* 712; or, a gift to such charitable uses as the testator's executor shall appoint and the testator revokes the appointment of the executor, *White vs. White* 1 *Bro. Ch. R.* 12; or, a gift to such charitable uses as A shall appoint and A dies in the life time of the testator, *Moggridge vs. Thackwell*, 1 *Ves. Jr.* 464; 3 *Bro. Ch. R.* 517; 7 *Ves. Jr.* 36; 13 *Ves. Jr.* 416; or, he neglects or refuses to appoint, *Atty. Gen vs. Boultbee*, 2 *Ves. Jr.* 380; or, a gift to such charitable uses as the testator himself has appointed and no such appointment can be found, *Atty Gen. vs. Syderfen*, 1 *Vernon* 224; *same case* 7 *Ves. Jr.* 43 *n*; or, to such charitable uses as he shall appoint and he dies without making an appointment, *Freem. Ch. Cases* 261; *Mills vs. Farmer* 1 *Mer.* 55; or, a gift to the trustees of a charity who refuse to accept, *Atty. Gen. vs. Andrews* 3 *Ves. Jr.*

633. In these, and all such cases, though the bequest would, upon the principles which govern the construction of testamentary dispositions in favor of general objects, be void for uncertainty; yet, the object being charity, the crown, as *parens patriæ*, or the court, will execute it. Charities are so highly favored in the law that they have always received a more liberal construction than the law will allow in gifts to individuals. 2 *Story's Eq. Jr. Sec.* 1163. If an estate is devised to such persons as the executor shall name and no executor is appointed; or, if one being appointed, he dies in the lifetime of the testator and no other is appointed in his place, the bequest becomes a mere nullity; yet, such a bequest, if expressed to be for a charity, would be good; and the Court of Chancery would, in such case, assume the office of executor and effectuate the bequest. 2 *Story's Eq. Jur. Sec.* 1166; *Mills vs. Farmer*, 1 *Mer. R.* 55, 94; *Moggridge vs. Thackwell*, 7 *Ves. Jr.* 37; *Atty. Gen. vs. Jackson*, 11 *Ves. Jr.* 365, 367. So, if a legacy is given to trustees to distribute and they all die in the testator's life time, yet the defect will be supplied in equity. 2 *Story's Eq. Jur. Sec.* 1163; *Atty. Gen vs. Hickman*, 2 *Eq. Cas Ab.* 193; *Duke on Char. Us.* 476; *Moggridge vs. Thackwell*, 3 *Bro. Ch. Rep.* 517; *S. C.* 1 *Ves. Jr.* 464.

Another objection taken to the validity of the devise is that it creates a perpetuity, and thus renders the lands devised forever inalienable, being devised to the trustees to be by them rented and the net proceeds to be applied for the uses and purposes of the trust. As a general principle, it is true that the law prohibits such dispositions of real estate, and in general it cannot be thus tied up; but it nevertheless in this, as in many other respects, makes charity an exception to this rule against perpetuities. *Lewis on Perpetuity*, 687; (52 *Law Lib.* 437.) It follows, from the nature of the purposes and objects to which the property is devoted and the character of the ownership to which it is subjected, that for all practicable purposes it will be in dead or unserviceable hands. This, it is obvious, is the characteristic of alienations to charitable uses: it is in the very nature of such dispositions to withdraw the subject of them from any kind of circulation, as a contrary course would defeat the manifest object, which is the sustentation of the charitable institutions, or the carrying out in continuity of the benevolent purposes for which they are made.

Opinion :—Acts of 9 Geo. II. and 17 Geo. II.

Until the Statute 9 Geo. II. ch. 36, little restraint was imposed upon alienations of this sort, but the apprehensions, entertained in the reign of Geo. II., that persons on their death beds might make large and improvident dispositions of their property for such purposes gave rise to this Statute, which was designed to counteract or check such dispositions ; and under the supposition that men were in but little danger of being perniciously generous at the sacrifice of their own comfort or enjoyment, when uninfluenced by the near approach of death, it was considered that this end would be sufficiently attained by preventing persons from aliening more of their lands than they chose to part with in their lifetime. *Lewis on Perpetuity*, 689. (52 *Law Lib.* 438); 3 *Peters S. C. R.* 99. In reference to the Statute 9 Geo. II., Sir William Grant said ; " In its causes, its objects, its provisions, its qualifications, and its exceptions, it was a law wholly English, calculated for purposes of local policy, complicated with establishments, and incapable, without great incongruity in the effect of being transferred, as it stands, into the code of any other country."

But it is said that our statutory law prohibits the disposition of lands in perpetuity, and that the devise in this case is void on that ground. There are but two statutes in this State which at all approximate to the subject. The one is that of 17 Geo. II, passed in 1744, entitled " An Act for the enabling religious societies of Protestants within this government to purchase lands for burying ground, churches, houses for worship, schools, &c." This Act authorizes religious societies of Protestants to purchase, take and receive, by gift, grant or otherwise, land for burying-grounds, erecting churches, houses of religious worship, schools, and alms-houses, for any estate whatsoever,and to hold the same for such uses andpurposes ; *provided*, (by the fourth section) that nothing in the act contained should be deemed, taken or construed to enable any of the said religious societies of people, or any person or persons whatsoever in trust for them or to their use, to purchase, take or receive any lands or tenements by gift, grant or otherwise, for or towards the maintenance or support of the said churches, houses of worship, schools, or alms-houses, or the people belonging to the same, or for any other use or purpose save for the uses in the Act before mentioned. It is not contended that the devise in question is rendered invalid by this Act, or in any wise affected by it ; but it is insisted that any devise of land, or

of money to be laid out in land, is void except in the mode allowed by the third section of the Act of 1787 (*Digest Del. Laws.* 460,461.) This is an act designed exclusively for the protection and government of the temporal concerns of all religious societies or denominations, the first section of which provides that each and every religious society or congregation of christians, of whatever sect or denomination, may elect or choose any number of their society, not exceeding seven nor less than three,to be trustees of the same; which said trustees and their successors in office are constituted a body politic and corporate, by whatever name they may take and assume; and the second section provides that the said trustees, in their corporate name and capacity, shall forever thereafter be authorized in law to purchase, take, hold, receive, and enjoy any messuages, lands, tenements, rents and other hereditaments and real estate, in fee-simple or otherwise, and also goods and chattels, sum or sums of money, and personal estate whatsoever, to and for the use of their respective societies or congregations; provided (by the third section) that all gifts, grants, bargains, sales and conveyances of and for the same shall be made by deed, twelve calendar months, at least, next before the death of the donor, grantor or bargainor; otherwise to be void. The trustees of these religious societies are by this Act made and constituted corporate bodies, and like all other corporations are the mere creatures of the law, created and existing by it and only in the manner and for the purposes therein and thereby limited and prescribed; and, therefore, they cannot exercise any power whatever not expressly given them, much less that which the law creating them expressly declares they shall not have or exercise. It follows, therefore, that any gift, grant, or conveyance of lands, or money to be laid out in lands, or any other gift, grant or conveyance to the trustees of any such society, not conformable to the provisions of the Act from which they derive their existence as a corporate body, would be absolutely void; and this was the ground upon which the decision of the court was based in the case of the *State vs. Bates, Adm'r of John Wiltbank dec'd.* 2*Harring. R.* 18. This was the case of a devise by Wiltbank of the proceeds of the sale of real estate to the trustees of the Methodist Episcopal Church at Dover, in their corporate capacity, to be applied by them in such manner as they should devise, towards educating poor children of the members of said church. The Court in that case very properly held that the

devise was void, not on the ground, however, that a devise for charitable purposes could not be made and enforced, but because it was a devise to the trustees of a religious society, falling precisely within the prohibition of the very law which gives them existence as a corporate body, not being conformable either to the provisions of the Act of 1787 or of 17 Geo. II, in 1744, but in direct derogation of both.

The case now under consideration is of a different character ; and altogether unlike that of a devise to trustees of a religious society. It cannot be classed among the mischiefs intended to be guarded against by our Statute ; nor does it fall within their prohibtion.

In the view which we have taken of this case it is one of a valid trust for charitable uses and purposes, with trustee appointed by the testator to execute it, with the aid of agents, to be appointed, to select the objects of the testator's bounty in a mode sufficiently indicated by the testator, and which is not prohibited or rendered invalid by any statute of this State.

The remaining and perhaps the most important question, next to be considered, is," whether the devise is capable of being sustained and carried out in a court of chancery, according to the rules and principles of equity."

This objection leads to the inquiry whether the Court of Chancery, prior to and independent of the Statute 43 Elizabeth, had jurisdiction to enforce charitable uses, or whether its jurisdiction was derived solely from that Statute. We find no evidence on the face of the Statute itself that such jurisdiction was conferred by it. It contains no provision from which such a conclusion can be drawn, either directly or inferentially, except in case of appeal from the commissioners. The Statute itself, then, affording no evidence as to the source from whence this jurisdiction was derived we are obliged to seek other information ; and we know of none so likely to lead us to proper and correct conclusions as adjudged cases by learned and able jurists, whose opinions have been formed upon a thorough investigation of the subject and are the result of much labor and research. In the case of *Eyre vs. the Countess of Shaftsbury*, 2 *P. Wms.* 119, Sir Joseph Jekyll said " in the case of charity the King, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the Statute of Elizabeth relating to charitable uses,

and antecedent to it, as well as since, it has been every day's practice to file informations in chancery, in the Attorney General's name for the establishment of charities. 2 *Equity Cas. Ab.* 710. And Lord Northington in the case of *Atty. Gen. vs. Tancred*, 1 *Eden R.* 10; *same case in Amb. R.* 351; 1 *Wm. Blk. R.* 90; and Lord Chief Justice Wilmot in the case of *Atty. Gen. vs. Lady Downing*, both held the same doctrine. Lord Redesdale, who was confessedly a very learned and able chancery lawyer, in the case of the *Atty. Gen. vs. the Mayor of Dublin*, 1 *Bligh's R.* 347, says, in reference to the Statute 43 Elizabeth, "the Statute only created a new jurisdiction, a jurisdiction created by commission, but the proceedings of the commissioners were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for preserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that Statute; and there was no doubt," he said, "but the same thing could be done *by information by the Attorney General in the exercise of his right of prerogative*; that the King, as *parens patriæ*, has the right, through his proper officers, to call upon the several courts of justice, according to their respective jurisdictions, to see that right is done to his subjects who are incapable to act for themselves as in the case of *charities* and other cases." It appears, therefore, that Lord Redesdale repudiates the doctrine that the jurisdiction of the Court of Chancery over charitable uses was derived from the Statute 43 Elizabeth; and he maintains it in the fullest and broadest terms as being the inherent jurisdiction of chancery independently of and antecedent to the Statute of Elizabeth. In the case of *Atty. Gen. vs. Middleton*, 2 *Ves. Sr.* 327 (so far back as 1751), Lord Chancellor Hardwicke said that information in the name of the Attorney General as an officer of the crown was not a head of the Statute of charitable uses, because original jurisdiction was exercised in that court before; but that was always in cases now provided for by that Statute, that is, charities at large. So in the case of *Atty. Gen. vs. Matthews*, 2 *Levinz* 167, it was held that general charities were not within the power of the commissioners under the Statute 43 Elizabeth. "This being a general charity, and for the poor in general," says Lord Keeper Finch, "the commissioners have nothing to do with it, but it is to be determined by the Court of Chancery on information by the Attorney General in behalf of the King" And, in the case

Opinion :—question of jurisdiction.

of *The Incorporated Company vs. Richards*,1 *Drury & Warren's R.* 258, Lord Chancellor Sugden, in a very able and elaborate opinion upon the very point now under consideration, declared that in equity there is inherent jurisdiction over cases of charity; and that it is one of the objects for which a court of equity has at all times interfered to make good that which at common law was void. In the case of *Sarah Zane's will*, in the Circuit Court of the U. S., at the April Term 1833, Judge Baldwin, after a very laborious research into the English statutes and authorities, arrived at the same conclusion; and, in a very able and lucid opinion, maintained the doctrine of inherent jurisdiction independently of and antecedent to the Statute 43 Elizabeth,in which opinion Judge Hopkinson entirely concurred, Here is a current of authorities, sustained by the opinions and *dicta* of very eminent Judges, establishing the doctrine that, independently of and prior to the Statute 43 Elizabeth, the Court of Chancery could enforce charitable uses under its general jurisdiction, and that such jurisdiction had been exercised both subsequent and antecedent to that Statute. The defendants, however, maintain the contrary doctrine; and,in support of their position, they rely mainly upon the case of *The Baptist Association, vs. Hart's Executors*, 4 *Wheaton* 1, and the authorities there cited in support of the objection to the validity of the devise in that case. It is, doubtless, true that the opinion of the court in the case of *The Baptist Association vs. Hart's Ex'rs*, was delivered by a judge who stands deservedly pre-eminent in his profession, equalled by few and perhaps surpassed by none of his day in this country, and whose opinions are entitled to great respect. But, since that opinion was announced by Chief Justice Marshall, the same Court, so recently as the January Term 1844, decided the case of *Vidal et. al vs. the Mayor, Aldermen and Citizens of the city of Philadelphia*, in which they overrule and abandon the principles upon which the decision in *The Baptist Association case* was based; and they take the ground that antecedent to and independently of the Statute 43 Elizabeth the Court of Chancery had jurisdiction over charitable uses. Mr. Justice Story, in delivering the opinion of the Court in the case just referred to, after reviewing all the authorities, including the case of *The Baptist Association vs. Hart's Ex'rs*,which he said was strongly relied on as fully in point, says, "but very strong additional light has been thrown upon this subject by the recent publications of the com-

missioners on the public records in England which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the Statute 43 Elizabeth ; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish, in the most satisfactory and conclusive manner, that cases of charities, where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed or the trustees were not competent to take. These records, therefore, do, in a remarkable manner, confirm the opinion of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale and Lord Chancellor Sugden. Whatever doubt, therefore, might properly be entertained upon the subject when the case of *The Baptist Association vs. Hart's Ex'rs*, was before this Court in 1819, these doubts were entirely removed by the later and more satisfactory sources of information to which we have alluded."

The Baptist Association case, and those of Virginia and Maryland which were evidently decided on its authority, and of course must fall with it, being thus stricken, as it were, from the catalogue of judicial decisions, the question rests on the authority of adjudged cases in several of the different States, affirmed by the United States Court in the case of *Vidal vs. the Mayor, Aldermen, and Citizens of Philadelphia*, just referred to, all going to establish most conclusively an inherent jurisdiction in the Court of Chancery anterior to, and independent of, the Statute of 43 Elizabeth.

If the Court of Chancery in England is clothed with this jurisdiction, the same jurisdiction belongs to the Court of Chancery of the State of Delaware. Equity jurisdiction in this State was originally vested in the Court of Common Pleas,and the Justices of that Court were clothed with the powers of the High Court of Chancery of Great Britain and required to observe the rules and practice of that Court in the exercise of the jurisdiction thus conferred upon

Opinion:—conclusion.

them. 1 *Del. Laws*, 130, 131. And, by the Constitution of 1792 of the State of Delaware, the equity jurisdiction theretofore exercised by the Court of Common Pleas, was separated from the common law jurisdiction and vested in a Chancellor, who should hold a Court of Chancery in the several counties of the State. *Art. VI, Sec.* 14 *of Constitution of* 1792.

Under the view which we have taken of the respective branches of this case, it is the opinion of the Court that the decree of the Chancellor ought to be, and it accordingly is, hereby, affirmed.

INDEX.

ACCEPTANCE.

An injunction will not be granted to restrain a party, holding the legal title to an undivided share of intestate real estate, from exercising the right attaching to such share, of accepting the intestate real estate in the Orphans Court. *Kinney* v. *Reddon, et al.*, 44.

ACCOUNT.

1. A testator, domiciled in Pennsylvania, after disposing of his estate in eight parts, valued the several lands devised, and charged each of them, in the hands of the devisee, with its excess in value over one equal eighth part of his estate.—*Held*, upon a bill filed to charge the lands in Delaware with the excess, that, in determining the existence and amount of the excess, the amount of the personal estate of the testator is to be taken as it is ascertained by the testamentary accounts settled by the Court having jurisdiction at the domicile of the testator. *Colwell Adm'r* v. *Miles*, 110.

2. Upon the death of a party committing waste the liability to account survives against his administrators. *Fleming, Trustee*, v. *Collins., Adm'r*, 230.

3. The general rule of law as to the appropriation of credits is, that the debtor has the right, if he pleases, to make the appropriation. If he omits to do so, the creditor may make it. If both omit, the law will apply the payments according to its own notions of justice; and, in cases of long and running accounts, where debts and credits are continuously occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due. *Pickering* v. *Day*, 333.

See EVIDENCE, 1.

JURISDICTION, 8.

ACT OF CONGRESS.

1. By Section 94 of the Act of Congress, entitled "An Act to provide Internal Revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, an *ad valorem* duty of five per cent. was imposed upon "all manufactures of cotton, wool, silk, &c.," *or of other materials not in this act prvided for.*"—*Held*, that molasses made from sorghum, not being otherwise provided for in the act, was subject to the *ad valorem* duty of five per cent. *Pickering* v. *Day*, 333.

2. The provision of the act of Congress of June 30th, 1864, that a collector of Internal Revenue shall, before entering upon the duties of his office, execute an official bond, does not apply to collectors appointed under a prior act and who are continued in office under a saving clause in such prior act. *Ib.*

ADMINISTRATOR AND ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

AGENCY.

An agent or trustee, when called to account under a bill in equity for an irregular or unauthorized exercise of powers, cannot object to making discovery of his transactions, on the ground that they are such as may subject him to a criminal charge, the object of the bill not being to enforce a criminal liability, but only to restrain from further unauthorized acts. *State* v. *Maury, et al.*, 141.

AGREEMENT.

See CONTRACT.

AMENDMENT.

Parties claiming separate and distinct interests in the subject matter of the suit cannot be joined as complainants in the same bill. But, in such case, if only one be entitled to relief, the Court may grant leave to amend the bill by striking out the name of the complainant who is not entitled to relief. *Reybold, et al.*, v. *Herdman, Sheriff, et al.*, 34.

ANSWER.

1. The answers of the grantor and grantee in a voluntary conveyance, denying a fraudulent intent, though responsive to the bill, not a defence, since such conveyance is, as against creditors, a fraud in law, irrespective of the intent of the parties. *Logan, et al.*, v. *Brick, et al.*, 206.

ANSWER—*Continued.*

2. The answer of an assignee, denying knowledge of fraud in certain securities assigned to him and alleging himself to be a *bona fide* purchaser, for value, being responsive to the bill, is conclusive, unless rebutted by two witnesses or by one witness with corroborating circumstances. *Ib.*

3. To a charge in the bill that the complainant was surety in a bond, and as such entitled, on payment, to an assignment of the bond, it is not a responsive answer to allege that he is not entitled to the equity of a surety because by an agreement made at the time of giving the bond he was precluded from the protection now sought by the assignment. Such a defence must be proved *aliunde*. *Merriken* v. *Godwin, et al.*, 236.

4. A denial by the answer, responsive to an allegation in the bill, must prevail unless it is overcome by the testimony of two witnesses, or of one witness with sufficient corroborating circumstances. *Pickering* v. *Day*, 333.

APPOINTMENT.

1. Where a power of appointment is vested in one of two persons or bodies, either may exercise it, and the one first exercising it does so to the exclusion of the other. *Griffith* v. *State*. (*Appendix*,) 421.

2. A devise of a fund to trustees for the benefit of the poor of Kent County, &c., to be distributed "by agents, to be appointed by the Orphans Court or the Levy Court of Kent County, as may be deemed most proper," is not void for uncertainty as to which one of the two Courts shall appoint the agents. Either Court may exercise the power of appointment. If both refuse, this Court will appoint. So, were the power of appointment void for uncertainty, this Court would have power to create the necessary agency. *Ib.*

APPORTIONMENT.

An apportionment of the amounts due on several successive official bonds, respectively indorsed on the bonds and signed by the sureties therein, is conclusive in the absence of fraud or mistake. *Pickering* v. *Day*, 333.

APPROPRIATION OF PAYMENTS.

1. The general rule of law as to the appropriation of credits is, that the debtor has the right, if he pleases, to make the appropriation. If he omits to do so, the creditor may make it. If both

APPROPRIATION OF PAYMENTS—*Continued.*

omit, the law will apply the payments according to its own notions of justice; and in cases of long and running accounts, where debts and credits are continuously occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due. *Pickering* v. *Day*, 333.

2. An exception to such general rule is the case of several official bonds executed by a collector or receiver of public revenue at different times, with distinct sets of sureties. In such case, in the absence of any appropriation of payments made by the parties, money collected under a subsequent bond will not, before it is discharged, be applied in payment of a prior one; but a court of equity will so appropriate the payments as to give each bond credit for the money due and collected under it. *Ib.*

ASSETS.

1. The *oldest* judgment creditor at law, having obtained a decree in equity setting aside a fraudulent conveyance to the debtor's children of land purchased by him prior to the recovery of the judgment, is not entitled to a preference in equity in the distribution of the proceeds of the land sold under a decree. In such case the equitable doctrine of distributing assets among creditors *pari passu* applies. *Newell* v. *Morgan*, 20.

2. A bond held by a decedent at his death, though not yet due, is assets for the payment of debts, and may be sold under a decree. *Grose* v. *McMullen's Ex'rs*, 227.

3. To exonerate the personal estate of a testator from the payment of debts, it is not sufficient that the real estate be charged. It must appear from the will, either expressly or by clear implication, that the testator intended to exonerate the personal estate. *Ib.*

4. The testator, at his death, held a bond for $7,000.00 not due for a number of years. By his will he bequeathed to his wife an annuity of $420.00, corresponding with the annual interest on the bond; and also gave some pecuniary legacies at her decease. His lands were charged with debts, and a portion of them directed to be sold for the payment of debts.—*Held*, not sufficient to exonerate the bond from liability for a deficiency after applying the residue of the personal estate and the proceeds of lands directed to be sold. *Ib.*

ASSETS—*Continued.*

5. The deficiency having been paid by devisees of the residuary real estate, relief granted by marshaling assets. *Ib.*

ASSIGNEE—ASSIGNMENT.

1. A conveyance being held fraudulent and void as against creditors, certain mortgages of the property conveyed, taken by the vendor by way of consideration, were nevertheless held good in the hands of an assignee for value without notice. *Logan et al.* v. *Brick, et al.*, 206.

2. The surety in a bond, upon tender of the debt, is entitled under the statute to an assignment of the bond, if demanded; and a refusal to make such assignment is a discharge of the surety *per se*, irrespective of the question whether, in consequence of such refusal, the surety has sustained injury. *Merriken* v. *Godwin, et al.*, 236.

3. The fact that an inequitable use might be made of the security assigned, as against the creditor, does not absolve him from making it, nor prevent the refusal of it from operating to discharge the surety. He should assign the security and afterward resist the inequitable use of it. *Ib.*

4. *Quere:* What would be the effect of proof that the assignment was sought *for the purpose* of making an inequitable use of it? *Ib.*

5. Tender of payment to one of several creditors and a demand from him of an assignment of the security, although the security may not be in his possession, binds all the obligees, and his refusal is equivalent to the refusal of all. *Ib.*

6. H., being indebted to W. on a note under seal for $109, took from a third party an assignment of a note of W. for $58.83, with the knowledge of W. and with the understanding between the parties, that it would be credited against the note for $109.—*Held*, that the equity to such credit attached to the note for $109, and followed it into the hands of an assignee, though without notice. *Hall v. Hickmam et al.*, 318.

ATTACHMENT.

Breach of an injunction against the further drawing of a lottery punished, under the circumstances, by imprisonment of two weeks and until the drawings should cease. *State v. Eddy*, 269.

BANK.

1. A bank, being the holder of a promissory note protested for non-payment, has not the right to credit it with deposits made by the debtor to his account as a Justice of the Peace; and its omission to do so does not discharge the indorser. *McDowell v. Bank of W. & B.* 1.

2. An agreement by the bank to credit the note with such fees as the debtor might earn as a Notary Public in protesting bills and notes for the bank, does not discharge the indorser, though made without his privity. *Ib.*

3. Under articles of association which had been adopted as part of the charter of the bank, it was provided that so long as a stockholder might remain indebted to the bank his stock should not be transferable.—*Held*, that the defendant was not liable in damages for refusing to permit the indorser, while still remaining liable on his indorsement, to transfer his stock on the books of the bank. *Ib.*

BANKRUPTCY.

See INSOLVENCY.

BARON AND FEME.

See HUSBAND AND WIFE.

BEQUEST.

See LEGACY AND LEGATEE.—WILL.

BILL.

See PROMISSORY NOTE.

BILL OF REVIEW.

See PRACTICE, II.

BONA FIDE PURCHASER.

See PURCHASER FOR VALUE WITHOUT NOTICE.

BOND.

1. A debtor in failing circumstances gave his bond to one creditor to secure a debt due to such creditor, and, as to the balance, under a parol trust to pay certain other creditors, per schedule. *Held*, void as to the other creditors, who were not named in the bond and with whom there was no communication. *Comly* v. *Waters, et al.*, 72.

2. Such a transaction does not create a trust in favor of the creditors. The bond is revocable at the will of the obligor; and it is prohibited by the Statute of Frauds. *Ib.*

BOND—*Continued.*

3. A bond given by a debtor in failing circumstances, covering all his property for the benefit of preferred creditors, is contrary to the policy of the Statute against fraudulent insolvency. *Ib.*

4. A bond executed in *blank* by H. and sureties, to enable him to raise $300 by loan from B. was filled up and delivered, without their knowledge, to C. & N. for $354.48, in payment of a debt. *Held*, fraudulent and void as to the sureties. *Hastings, et al.* v. *Clendaniel, et al.* 165.

5. A bond executed in *blank*, for a specific purpose, cannot be otherwise filled up, without authority of the obligors. *Ib.*

6. Such authority must be proved affirmatively, to sustain the bond. *Ib.*

7. A vendor of certain store goods agreed to take them back, if unsold within one year, or to make good the loss upon a re-sale. His bond for $700.00, given subject to a written defeasance declaring it to be for the "security and safety of a forfeiture to the same amount, which the vendor stood bound for in an agreement for the purchase, &c.,"—*held*, not to have been given for stipulated damages but as a security for loss actually sustained by vendor's refusal to take the goods back. *Jester* v. *Murphy*, 171.

8. A bond held by a decedent at his death, though not yet due, is assets for the payment of debts, and may be sold under a decree. *Grose* v. *McMullen's Ex'rs*, 227.

9. The testator, at his death, held a bond for $7,000.00 not due for a number of years. By his will he bequeathed to his wife an annuity of $420.00, corresponding with the annual interest on the bond; and also gave some pecuniary legacies at her decease. His lands were charged with debts, and a portion of them directed to be sold for the payment of debts.—*Held*, not sufficient to exonerate the bond from liability for a deficiency after applying the residue of the personal estate and the proceeds of lands directed to be sold. *Ib.*

10. The surety in a bond, upon tender of the debt, is entitled under the statute to an assignment of the bond, if demanded; and a refusal to make such assignment is a discharge of the surety *per se*, irrespective of the question whether, in consequence of such refusal, the surety has sustained injury. *Merriken* v. *Godwin et al.*, 236.

11. The fact that an inequitable use might be made of the

BOND—*Continued.*

security assigned, as against the creditor, does not absolve him from making it, nor prevent the refusal of it from operating to discharge the surety. He should assign the security and afterward resist the inequitable use of it. *Ib.*

12. *Quere:* What would be the effect of proof that the assignment was sought *for the purpose* of making an inequitable use of it? *Ib.*

13. Tender of payment to one of several creditors and a demand from him of an assignment of the security, although the security may not be in his possession, binds all the obligees, and his refusal is equivalent to the refusal of all. *Ib.*

14. To a charge in the bill that the complainant was surety in a bond, and as such entitled, on payment, to an assignment of the bond, it is not a responsive answer to allege that he is not entitled to the equity of a surety because by an agreement made at the time of giving the bond he was precluded from the protection now sought by the assignment. Such a defence must be proved *aliunde*. *Ib.*

15. A sale of land, in execution of a judgment on a bond accompanying a mortgage—the sale being for a part only of the debt secured by the bond and mortgage—does not discharge the mortgage as a security for the residue of the debt. *Schock* v. *Lesley*, 304.

16. Executors gave a bond for payment of a legacy, subject to an agreement that any legal and proper abatement from the legacy, if ascertained before the bond became due and payable, should be credited; otherwise, that the bond should be absolute. Upon a failure to ascertain the amount to be abated from the legacy, before the bond became due and payable,—*held*, that the failure being through default of the executors, a court of equity will not extend the time for ascertaining the abatement. *Kersey et al.*, v. *Bailey et al.*, 328.

17. An exception to the general rule as to the appropriation of payments is the case of several official bonds executed by a collector or receiver of public revenue, at different times, with distinct sets of sureties. In such case, in the absence of any appropriation of payments made by the parties, money collected under a subsequent bond will not, before it is discharged, be applied in payment of a prior one; but a court of equity will so appropriate the payments as to give each bond credit for the money due and collected under it. *Pickering* v. *Day*, 333.

BOND—*Continued.*

18. An apportionment of the amounts due on several successive official bonds, respectively indorsed on the bonds and signed by the sureties therein, is conclusive, in the absence of fraud or mistake. *Ib.*

19. The provision of the act of Congress of June 30th, 1864, that a collector of Internal Revenue shall, before entering upon the duties of his office, execute an official bond, does not apply to collectors appointed under a prior act and who are continued in office under a saving clause in such prior act. *Ib.*

20. Provisions in statutes for the taking of official bonds are directory only, and not conditions precedent to the exercise of the office, unless expressed to be such. *Ib.*

21. A bond under seal, though voluntary, creates a debt, and is impeachable only for fraud. *Garden, Ex'x.* v. *Derrickson et al.*, 386.

22. Such a bond is enforceable against the grantor, and against all claiming under the grantor as volunteers. *Ib.*

23. I.G. executed and delivered to her son, F. R. G., a bond for $7,100. Afterward she made voluntary conveyances of her real estate to other children. After her death a judgment upon the bond was recovered against her administrator.—*Held*, that in equity the real estate was bound by the judgment, irrespective of the question whether the bond for which it was recovered was voluntary or not. *Ib.*

See INDEMNITY, 1, 2.

BURDEN OF PROOF.

See EVIDENCE. V.

CANCELLATION.

1. A decedent having, in his lifetime, held certain securities which after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the Court. The absence of the papers raises no presumption of such destruction or cancellation; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient. *Gilpin, Ex'r.* v. *Chandler, et al.*, 219.

2. A decedent held in his lifetime certain securities, to the amount of $1000, given for property conveyed to the separate use of his wife. He was at the same time indebted to her for money

CANCELLATION—*Continued.*

loaned him out of her separate estate, amounting, with interest, to about the like sum. After making his will, in order to satisfy her with its provisions, he had promised that the securities should not be enforced. The securities were not found among his papers after his death.—*Held*, sufficient proof that he had voluntarily destroyed them. *Ib.*

CHARGE.

1. A legacy charged upon land was bequeathed to a married woman, subject to the deduction of a book account held by the testator against her. The testator held a note of the legatee's husband, but no reference to this note was made in the bequest. The husband also became indebted to the executor of the testator for goods purchased at a vendue of the personal estate. The husband died before the wife, without having reduced the legacy into his possession and without any settlement with the executor touching the same or his own indebtedness to the estate of the testator. *Held*, that on a bill filed by the administrator of the wife (who had survived her husband and died) to recover the legacy from the devisee of the land charged, the husband's indebtedness to the estate of the testator could not be treated as payment of the legacy. *Cartmell, Adm'r*, v. *Perkins*, 102.

2. A legacy charged upon land, and payable by the devisee of the land, is a trust falling within the exclusive jurisdiction of courts of equity, and as such is not subject to the equitable defence of lapse of time, by analogy to the Statute of Limitations; otherwise, of a legacy payable by the executor or administrator out of the personal estate, and which is recoverable both at law and in equity. *Ib.*

3. A testator, domiciled in Pennsylvania, after disposing of his estate in eight parts, in order to equalize the distribution of it, set a value upon the several lands devised, and charged each of them, in the hands of the devisee, with its excess in value over one equal eighth part of the whole estate—such excess to be paid, within six months after the testator's decease, to his executors as part of the residuary estate. The lands were devised to trustees for the several parties interested, the trustees being also the executors. Part of the devised lands were situated in Delaware, and were valued by the testator at $20,000; which sum, upon the settlement of the testamentary accounts, was found to exceed one equal eighth part of the testator's whole estate. On a bill filed by the administrator d. b. n. c. t. a. of the testator and the executor of the survivor of the

trustees, to charge the lands in Delaware with the excess.—*Held, that,*

(1.) The charge of the excess, being upon an undivided share of certain lands, is not discharged by proceedings for partition, under which the real estate comes to be held in possession by the devisee in severalty.

(2.) The land sought to be charged, having been devised in trust for one for life (to whom was given the rents and profits) with remainder to his children, the omission of the trustees to collect the excess from the tenant for life is no bar to relief against the remainderman for the principal of the excess.

(3.) The receipt by trustees of rents and profits sufficient to pay the excess does not, unless paid over to the executor, exonerate the lands, in the hands of the remainderman, from payment of the principal of the excess; otherwise, as to interest on the excess accrued prior to the possession of the remainderman. *Colwell, Adm'r.*, v. *Miles*, 110.

4. The testator, at his death, held a bond for $7,000.00 not due for a number of years. By his will he bequeathed to his wife an annuity of $420.00, corresponding with the annual interest on the bond; and also gave some pecuniary legacies at her decease. His lands were charged with debts, and a portion of them directed to be sold for the payment of debts.—*Held*, not sufficient to exonerate the bond from liability for a deficiency after applying the residue of the personal estate and the proceeds of lands directed to be sold. *Grose* v. *McMullen's Ex'rs*, 227.

5. To exonerate the personal estate of a testator from the payment of debts, it is not sufficient that the real estate be charged. It must appear from the will, either expressly or by clear implication, that the testator intended to exonerate the personal estate. *Ib.*

CHARITABLE USES.

1. Charitable uses are not within the rule of law against perpetuities. *State* v. *Griffith, et al.*, 392.

2. Prior to the English Statute of 9 GEO. II, charitable uses in England were subject to no restriction. *Ib.*

3. A devise of real estate, with a direction that the same be not sold but rented—"the proceeds arising from such rents" to be applied to certain charitable uses,—*held*, not to be within the law against perpetuities. *Ib.*

CHARITABLE USES—*Continued.*

4. An equitable interest vests in the beneficiaries of a charitable use, from the time of their appointment or selection, such as entitles them to enforce their equitable rights. *Ib.*

5. The jurisdiction of the Court of Chancery in this State to protect and enforce charitable uses considered at large and sustained. *Ib.*

6. Such jurisdiction, in England, existed in the Court of Chancery prior to the Statute of 43 Elizabeth, and is not founded on that Statute. *Ib.*

7. The case of *Baptist Association vs. Hart's Ex'rs*, 4 *Wheat. S. C. Rep.* 1, and *Vidal et al. vs. Girard's Ex'rs.*, 2 *How. S. C. Rep.* 127, reviewed. *Ib.*

8. A devise of lands in trust "to and for the support, maintenance and education of the poor white citizens of Kent County generally," coupled with a direction that no part of the bequest should "be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof," is not void for uncertainty in the description of the objects. *Ib.*

9. Uncertainty as to the individual beneficiaries, until appointment or selection, is characteristic of a charitable use. *Ib.*

10. A devise to certain charitable uses of a fund, to be distributed "by agents, to be appointed by the Orphans Court or the Levy Court of Kent County, as may be deemed most proper," is not void for uncertainty as to which one of the two Courts shall appoint the agents. Either Court may exercise the power of appointment. If both refuse, this Court will appoint. So, were the power of appointment void for uncertainty, this Court would have power to create the necessary agency. *Ib.*, 392.

11. The English mortmain acts did not extend to the British colonies. *Ib.*

12. The Delaware Statute of 17 Geo. II. for the relief of religious societies, &c., considered; its history and objects. The prohibitions in this statute against testamentary gifts of real estate to religious societies do not affect charitable uses generally. *Ib.* See also, *Griffith* v. *State*, (*Appendix*) 421.

13. Devise in trust for the benefit of "such only of the poor of

CHARITABLE USES—*Continued.*

Kent County who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof."—*Held*, to be a description of the beneficiaries not too uncertain to be carried into effect. *Griffith* v. *State*, (*Appendix*) 421.

14. Devise of a fund to trustees for the benefit of the poor of Kent County &c,—" the distribution thereof to be made by agents to be appointed by the Orphans Court or the Levy Court of Kent County, as may be deemed most proper."—*Held*, that either the Orphans Court or the Levy Court were competent to appoint the necessary agents for distribution of the fund; but that were it otherwise, or were both the courts designated to refuse or neglect to make such appointment, the Court of Chancery is competent to supply the required agency. *Ib.*

15. Uncertainty as to the objects of a charitable use is not an objection to its validity. In this respect charitable uses differ from ordinary trusts. If the objects be uncertain, or the particular mode of application fail, the fund may be administered, in England, either by the Crown, as *parens patriæ*, or by the Court of Chancery; in this State such a charity will be administered by the Court of Chancery. *Ib.*

16. The rule of law against perpetuities is not applicable to trusts for charity. *Ib.*

17. The jurisdiction of the Court of Chancery to enforce such charitable uses as were void or defective at common law was not derived from the Statute of 43 Elizabeth, but existed prior to and independently of that Statute. *Ib.*

18. The jurisdiction over charitable uses exercised by the English Court of Chancery is by the constitution and laws of this State vested in its Court of Chancery *Ib.*

COLLECTOR OF INTERNAL REVENUE.

1. The omisssion of a Collector of public revenue to remove a Deputy Collector, after knowledge of default by the latter, does not discharge the sureties of the Deputy Collector. *Pickering* v. *Day*, 333.

2. The consent by a Collector of Internal Revenue that a Deputy Collector should use in his private business public funds collected by him, such consent not being communicated and assentcd to by the sureties of the deputy in an official bond given to the Collector, discharges the sureties. *Ib.*

COLLECTOR OF INTERNAL REVENUE—*Continued.*

3. Such consent not sufficiently proved in the particular case. *Ib.*

4. The provision of the act of Congress of June 30th, 1864, that a collector of Internal Revenue shall, before entering upon the the duties of his office, execute an official bond does not apply to collectors appointed under a prior act and who are continued in office under a saving clause in such prior act. *Ib.*

5. Provisions in statutes for the taking of official bonds are directory only, and not conditions precedent to the exercise of the office, unless expressed to be such. *Ib.*

COMPENSATION.

A voluntary trustee, without contract for compensation, is not entitled to it in equity; though he will be allowed his expenses and saved from loss. *Brooks, Adm'r, et al.* v. *Egbert*, 83.

COMPETENCY.

See EVIDENCE, III.

WITNESS.

CONSIDERATION.

1. An inquiry, whether there was any and what consideration existing at the time of the execution of a certain writing obligatory does not present a sufficiently distinct fact to be the subject of an issue out of Chancery, for trial by a jury. *Comly* v. *Waters, et al.* 72.

2. The surety's liability for his principal is not a valuable consideration, as against creditors of the principal, for a bond conditioned for the payment of a sum of money as a debt. *Jefferson* v. *Tunnell, et al.* 135.

3 Injunction granted to restrain the collection of a promissory note, the consideration of which has failed. *Ewing* v. *Chase, Adm'r.* 278.

4. Agreement to sell a stage line and the right, under a sub-contract with the Government contractor, to carry the mails for an unexpired term of one year and nine months. The vendee, after running the stage line and carrying the mails six months, was deprived by the Government contractor of the mails. Soon afterward the vendor was again employed to carry the mails, and carried them for the residue of the term.—*Held*, a failure of consideration, to the value of the mail privilege, of a note given for the purchase. *Ib.*

CONTEMPT.

1. Equity will not interfere to restrain the legatee from an action at law for the legacy, on the ground that he is in contempt for not performing a decree made in another suit for the execution of a new bond in lieu of the original one given to the testator and since lost. *Hayes, Adm'r.* v. *Hayes*, 191.

2. Breach of an injunction against the further drawing of a lottery punished, under the circumstances, by imprisonment two weeks and until the drawings should cease. *State* v. *Eddy*, 269.

CONTRACT.

1. An agreement between the creditor and the principal debtor, in order to discharge the surety, must be such as gives time to the debtor; and it must be for a consideration. *McDowell* v. *Bank of W. & B.* 1.

2. An agreement by the bank to credit the note with such fees as the debtor might earn as a Notary Public in protesting bills and notes for the bank does not discharge the indorser, though made without his privity. *Ib.*

3. A post-nuptial agreement that the wife shall enjoy, for her sole and separate use, property to which the husband has become entitled in her right, if upon sufficient consideration and not in fraud of creditors, will be enforced in equity. *Kilby, Adm'r*, v. *Godwin, et al.* 61.

4. Pending a suit in equity by the wife against her husband for enforcing an ante-nuptial contract, it was agreed by the husband, as a compromise of the suit and in consideration of its dismissal with the wife's consent, that one half part of certain funds held by him, in her right, should be for her sole and separate use; and such half part was, pursuant to the agreement, delivered to the wife's solicitor and came to her possession, and was afterward, during her last sickness, disposed of by her as a *donatio causa mortis.—Held*, that the agreement was valid; and that the funds delivered, in pursuance of it, became the wife's separate property, and passed by her disposal of them as a *donatio causa mortis*. *Ib.*

5. The complainant and the defendant, A. entered into a parol contract for an exchange of lands—the complainant agreeing to convey a tract of woodland and pay $300.00 in cash—the defendant, A. agreeing to convey, together with his wife, a tract of marsh, the title to which was held by the wife. Possession was mutually delivered. It was agreed that the parties should meet at the house of G. F. to execute conveyances; but such meeting was delayed

CONTRACT—*Continued.*

and never took place. The defendant, A. cut off the timber from the woodland delivered into his possession under the contract. Afterward the defendant, A., without any tender of performance on his part, or demand upon the complainant for the execution of the contract, sold and conveyed the marsh to the defendant, I. On bill filed by the complainant for a specific performance.—*Held*, that the defendant, A. was not entitled to abandon the contract and to re-sell the marsh, without first tendering to the complainant a deed for the marsh and demanding performance on his part; that, under the circumstances, the complainant was not in laches. *Burton* v. *Adkins, et al.*, 125.

6. *Held further*, that the defendant, A. was not entitled to abandon the contract, after having cut the timber off the woodland and thereby substantially destroyed its value, so that the complainant could not be placed *in statu quo*. *Ib.*

7. A purchaser under a contract for the sale of land accepted a deed and entered into possession, in December, 1854, soon after which he discovered that the land had been sold, before the conveyance to him, for unpaid taxes; but he continued in possession until 1858, when, without eviction, he abandoned it.—*Held*, that after so long delay he was not entitled to wholly rescind the contract; but *held also*, that a portion of the purchase money remaining unpaid, a court of equity will restrain the collection of it until a good title be made. *Houston, et al.* v. *Hurley's Adm'rs*, 247.

8. A purchaser under a contract for the sale of land, who has accepted a deed and entered into possession, will, nevertheless, be relieved in equity against a defect of title afterward discovered by him, *if fraud in the sale was practiced upon him by the vendor*—Otherwise, *it seems*, if the deed were accepted *in the absence of fraud*. *Ib.*

9. The right to rescind a contract for fraud must be exercised promptly after the discovery of it. *Ib.*

10. An ante-nuptial contract, not recorded, raises no equity, at the suit of a debtor to the wife *dum sola*, to restrain the collection of the debt at law by process in the name of the husband and wife. *Ib.*

11. Such a debtor has no interest in the contract, entitling him to set it up in equity. *Ib.*

12. Nor is the debtor at any risk in paying the debt. Such payment would protect him against any future claim by the trus-

tee under the contract, who had not interfered to prevent the collection of the debt by the husband. *Hill* v. *Gorman, et al.*, 273.

13. Agreement to sell a stage line and the right, under a subcontract with the Goverment contractor, to carry the mails for an unexpired term of one year and nine months. The vendee, after running the stage line and carrying the mails six months, was deprived by the Government contractor, of the mails. Soon afterward, the vendor was again employed to carry the mails and carried them for the residue of the term.—*Held*, a failure of consideration, to the value of the mail privilege, of a note given for the purchase. *Ewing* v. *Chase, Adm'r*, 278.

14. A defence founded upon the alleged default of the vendee in the carriage of the mails is sustainable only by action of the Government, forfeiting the contract. *Ib.*

15. Mistake, to avoid an agreement, must be a mistake, not of *law*, but of *fact*; and it must be a plain mistake, clearly made out by satisfactory proof—not resting upon evidence loose, equivocal, or contradictory. *Pickering* v. *Day*, 333.

See INDEMNITY, 3, 4.

POWER OF ATTORNEY.

CONVERSION.

See EQUITABLE CONVERSION.

CORPORATION.

1. An express acceptance of an act of incorporation is not essential to the corporate existence, unless required by the act. An acceptance is implied from an organization of the corporators and the exercise of corporate powers. *Logan* v. *McAllister*, 176.

2. An act incorporating, without condition, persons already associated in business, having been granted on application, and ascertaining the corporators, vests the franchise immediately, subject only to such acceptance as is shewn by the exercise of the franchise. *Ib.*

3. An act was passed, upon the application of W. Y., incorporating "W. Y. and his associates," as the Rockland Manufacturing Company on the Brandywine; also, appointing directors and providing for their succession. The business had previously been

CORPORATION—*Continued.*

carried on by the firm of W. Y., Son & Co. Soon after the passage of the act, the partnership was dissolved, public notice given that the business would thereafter be carried on by the Rockland Manufacturing Company, new books were opened, a corporate seal procured, business conducted in the corporate name, the capital transferred on the books; and the real estate of W. Y., used in the business, was agreed to be taken at a valuation. After the death of W. Y., without having conveyed the real estate, the same was conveyed by trustees, under the direction of his will, to the Rockland Manufacturing Company, as a corporation.—*Held*, that the corporate existence was sufficiently established, and that title to the real estate vested in the Rockland Mauufacturing Company, as a corporation. *Ib.*

See BANK, 3.

COSTS.

A decree against a legatee for costs in a suit to enforce the execution of a new bond, in lieu of a lost bond is no ground for an injunction to restrain, an action at law for the legacy, since such costs could be set off the action at law. *Hayes, Adm'r*, v. *Hayes*, 191.

COVENANT.

Equity will, in some cases, decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the Court entertains bill *quia timet*. *Reybold, et al.* v. *Herdman, Shff. et al.* 34.

CREDITOR.

1. The *oldest* judgment creditor at law, having obtained a decree in equity setting aside a fraudulent conveyance to the debtor's children of land purchased by him prior to the recovery of the judgment, is not entitled to a preference in equity in the distribution of the proceeds of the land sold under a decree. In such case the equitable doctrine of distributing assets among creditors *pari passu* applies. *Newell* v. *Morgan*, 20.

2. Equity will recognize and give effect to a judicial preference at law by judgment or execution; but such judicial preference arises, not out of the speed of the parties in pressing their claims at law but out of their having obtained a *prior legal lien* upon the property in controversy. *Ib.*

3. A debtor in failing circumstances gave his bond to one creditor to secure a debt due to such creditor, and as to the balance

under a parol trust to pay certain other creditors, per schedule.—*Held*, void as to the other creditors, who were not named in the bond and with whom there was no communication. *Comly* v. *Waters, et al.* 72.

4. Such a transaction does not create a trust in favor of the creditors. The bond is revocable at the will of the obligor; and it is prohibited by the Statute of Frauds. *Ib.*

5. G. T., a guardian, being indebted to his ward, at the solicitation of his sureties, gave his judgment bond to three of them to indemnify them and their co-sureties; and, for the same purpose, assigned to them certain debts, which debts the sureties collected and held for indemnity.—*Held*, that the transaction was fraudulent and void, as against creditors of G. T. afterward recovering judgment. *Jefferson* v. *Tunnell, et al.* 135.

6. Sureties, not having paid the debt for which they are bound, are not creditors of their principal. *Ib.*

7. A voluntary conveyance, though without a fraudulent intent, is void, as against creditors, under the statute of 13 Elizabeth. *Logan, et al.* v. *Brick, et al.* 206.

8. Such a conveyance is void *if it tend to hinder and delay creditors*, though it may not otherwise injure them. *Ib.*

9. A creditor having the security of two funds out of which he can satisfy his debt, upon one of which only another creditor has a junior lien, will be compelled in equity to resort first to the fund which the junior creditor cannot reach. *Ib.*

10. The answers of the grantor and grantee in a voluntary conveyance, denying a fraudulent intent, though responsive to the bill, is no defence, since such conveyance is, as against creditors, a fraud in law, irrespective of the intent of the parties. *Ib.*

11. An assignee of certain securities, being a purchaser for value without notice, was permitted to hold them against creditors of an insolvent debtor; but having a collateral security for the money advanced upon the mortgages, was required, for the benefit of junior creditors against the mortgaged property, first to exhaust his remedy upon the collateral security. *Ib.*

12. A voluntary conveyance is void, as against creditors holding debts previously contracted. *Russell, et al.*, v. *Thatcher, et al.*, 320.

13. A husband, having reduced to his possession funds to which he became entitled in right of his wife, cannot subject them to a voluntary trust for the wife to the prejudice of a creditors. *Ib.*

CREDITOR—*Continued.*

14. A voluntary deed set aside, as against a creditor. *Humphries* v. *Wilson*, 331.

See EXECUTORS AND ADMINISTRATORS, 1.

PARTNERS AND PARTNERSHIP, 1, 2.

DAMAGES.

A vendor of certain store goods agreed to take them back, if unsold within one year, or to make good the loss upon a re-sale. His bond for $700.00 given subject to a written defeasance declaring it to be for the "security and safety of a forfeiture to the same amount, which the vendor stood bound for in an agreement for the purchase, &c."—*held*, not to have been given for stipulated damages, but as a security for loss actually sustained by vendor's refusal to take the goods back. *Jester* v. *Murphy*, 171.

DEBTS, JOINT AND SEPARATE.

See PARTNERS AND PARTNERSHIP. 1, 2.

DECREE.

1. The relief granted in equity must be according to the case made by the bill. *Cloud, Adm'r* v. *Whiteman, Ex'r*, 23.

2. Bill against one charging him as *executor* for payment of a legacy, will not authorize a decree against him personally, as *devisee of land charged with the legacy*. *Ib.*

3. The prayer for general relief does not sustain such a decree. *Ib.*

4. The complainant, a married woman, had filed a previous bill in equity for arrearages of an annuity, claiming to recover *sui juris* on the ground of a divorce. The bill was dismissed for want of proof of the divorce.—*Held*, that the decree, not being directed to be without prejudice, was a bar to the present bill filed against the same defendant for the same subject matter. *Cochran* v. *Couper, Adm'r*, 27.

5. A final decree, entered upon the record and signed by the Chancellor, dismissing the bill, and not directed to be without prejudice, is a bar to another bill filed between the same parties for the same subject matter. *Ib.*

6. Under a decree for an account, after a loss of books and a lapse of twenty years from the date of the transactions, a general statement of account, made about the time of the transactions, admitted. *Jester* v. *Murphy*, 171.

See PREFERENCE, 1.

DEPOSIT.

See BANK.

DEPOSITIONS.

After argument of a cause at the final hearing, leave granted, under the circumstances, to exhibit interrogatories to take additional testimony and for a further hearing. *Southard* v. *Price*, 233.

DEVISE.

1. A bequest of personal property to the wife, with a devise that the real estate shall be sold and a fee simple title or titles conveyed, being of equal "tenor" with those by which the testator held the same, is not such a devise as will defeat the widow's claim of dower, or put her to an election. *Kinsey, et al.* v. *Woodward*, 92.

2. The testator, after devising his mansion house to his widow for life, provided thus;—"It is my desire that after the decease of my wife (or sooner if she should desire it) my dwelling house, &c., should be sold by my executors, hereinafter named, with the approbation of the Chancellor or an Orphans Court, and the proceeds equally divided among all my children now living, or their legal representatives."—*Held*, that the real estate was equitably converted from the death of the testator. *In re, Estate of Stevenson*, 197.

3. A devise of real estate, with a direction that the same be not sold but rented—"the proceeds arising from such rents" to be applied to certain charitable uses,—*held*, not to be within the law against perpetuities. *State* v. *Griffith*, 392.

4. A devise to certain charitable uses of a fund, to be distributed by "agents, to be appointed by the Orphans Court or the Levy Court of Kent County, as may be deemed most proper," is not void for uncertainty as to which one of the two Courts shall appoint the agents. Either Court may exercise the power of appointment. If both refuse, this Court will appoint. So, were the power of appointment void for uncertainty, this Court would have power to create the necessary agency. *Ib.*

5. A devise of lands in trust "to and for the support, maintenance and education of the poor white citizens of Kent County generally," coupled with a direction that no part of the bequest should "be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects

DEVISE—*Continued.*

thereof," is not void for uncertainty in the description of the objects. *Ib.*

6. Devise in trust for the benefit of "such only the poor of Kent County who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof."—*Held* to be a description of the beneficiaries not too uncertain to be carried into effect. *Griffith* v. *State*, (*Appendix*) 421.

7. Devise of a fund to trustees for the benefit of the poor of Kent County &c,—"the distribution thereof to be made by agents to be appointed by the Orphans Court or the Levy Court of Kent County, as might be deemed proper."—*Held*, that either the Orphans Court or the Levy Court were competent to appoint the necessary agents for distribution of the fund; but that were it otherwise, or were both the Courts designated to refuse or neglect to make such appointment, the Court of Chancery is competent to supply the required agency. *Ib.*

8. The third section of the Statute of this State which prohibits devises of lands to religious societies, except in the mode therein prescribed, does not apply to devises to charitable uses generally. *Ib.*

See CHARITABLE USE. MORTMAIN. WILL.

DISCOVERY.

1. The charter of the Wilmington Bridge Company provided that any excess of tolls received by the company over ten per cent. of its capital stock should be paid over to the trustee of the school fund for the use of the fund. The Company were directed to give notice to the trustee of the accruing of such excess, and the trustee was authorized to sue for the same at law. —*Held* that, notwithstanding a remedy at law was given by suit in the name of the trustee, a bill in equity would lie in the name of the State against the company for a discovery, account and payment. *State* v. *Wilmington Bridge Co.*, 58.

2. A court of equity has jurisdiction of a bill filed to restrain the further drawing of a lottery, under color of an Act of the General Assembly authorizing a lottery for raising a certain sum of money, upon the alleged ground that certain pre-requisites to the exercise of such authority prescribed by the act have not been complied with, and also that the authority granted has been exhausted by the drawing of lottery schemes competent to raise the required sum. Such irregular or excessive drawings is a breach of the trust

DISCOVERY—*Continued.*

confided by the act, and as such is remediable in equity. The Court has also jurisdiction for the purpose of discovery, in order to ascertain whether the authority granted has been exhausted. *State* v. *Maury, et al.* 141.

3. An agent or trustee, when called to account under a bill in equity for an irregular or unauthorized exercise of powers, cannot object to making discovery of his transactions, on the ground that they are such as may subject him to a criminal charge, the object of the bill not being to enforce a criminal liability, but only to restrain from further unauthorized acts. *Ib.*

DONATIO CAUSA MORTIS.

1 A *donatio causa mortis* defined. An actual delivery of the property essential; but this may be made to a third person for the use of the donee. *Kilby, Adm'r* v. *Godwin, et al.* 61.

2. A mother, in her last sickness, holding certain securities for her separate use, delivered the same, together with some articles of personal use, such as a watch and jewelry, to a third person, declaring them to be for the benefit of her two minor children; and, with the securities and articles, also delivered an inventory of the same. She died in a few days afterward.—*Held*, a valid *donatio causa mortis*. *Ib.*

DOWER.

A bequest of personal property to the wife, with a devise that the real estate shall be sold and a fee simple title or titles conveyed, being of equal "tenor" with those by which the testator held the same, is not such a devise as will defeat the widow's claim of dower, or put her to an election. *Kinsey, et al.* v. *Woodward.* 92.

EQUITABLE CONVERSION.

1. Equitable conversion of real estate by testamentary direction for sale—how far direction must be unqualified. *In re, Estate of Stevenson*, 197.

2. The testator, after devising his mansion house to his widow for life, provided thus:—"It is my desire that after the decease of my wife(or sooner if she should desire it) my dwelling house, &c., should be sold by my executors, hereinafter named, with the approbation of the Chancellor or an Orphans Court, and the proceeds equally divided among all my children now living, or their legal representatives."—*Held*, that the real estate was equitably converted from the death of the testator. *Ib.*

EQUITABLE RELIEF.

See JURISDICTION. REMEDY.

EVIDENCE.

I. *Admissibility.*

Under a decree for an account, after a loss of books and a lapse of twenty years from the date of the transactions, a general statement of account, made about the time of the transactions, admitted. *Jester* v. *Murphy*, 171.

II. *Answer as evidence.*

1. The answer of an assignee, denying knowledge of fraud in certain securities assigned to him and alleging himself to be a *bona fide* purchaser, for value, being responsive to the bill, is conclusive, unless rebutted by two witnesses or by one witness with corroborating circumstances. *Logan, et al.* v. *Brick et, al,* 206.

2. To a charge in the bill that the complainant was surety in a bond, and as such entitled, on payment, to an assignment of the bond, it is not a responsive answer to allege that he is not entitled to the equity of a surety, because by an agreement made at the time of giving the bond he was precluded from the protection now sought by the assignment. Such a defence must be proved *aliunde*. *Merriken* v. *Godwin, et al,* 236.

3. A denial by the answer, responsive to the allegations in the bill, must prevail, *unless it is overcome* by the testimony of two witnesses, or of one witness with sufficient corroborating circumstances. *Pickering* v. *Day*, 333.

III. *Competency of witness.*

The maker of a promissory note, after a judgment recovered against the indorser, not a competent witness for the indorser in a suit in equity to restrain the collection of the judgment. *McDowell* v. *Bank of W. & B.*, 1.

IV. *Depositions.*

After argument of a cause at the final hearing, leave granted, under the circumstances, to exhibit interrogatories to take additional testimony and for a further hearing. *Southard* v. *Price*, 233.

V. *Onus probandi.*

1. A decedent having, in his lifetime, held certain securities which after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the Court. The absence of the papers raises no presumption of such destruction or cancella-

EVIDENCE—*Continued.*

tion; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient. *Gilpin, Ex'r.* v. *Chandler, et al.*, 219.

2. A decedent held in his lifetime certain securities, to the amount of $1000, given for property conveyed to the separate use of his wife. He was at the same time indebted to her for money loaned him out of her separate estate, amounting, with interest, to about the like sum. After making his will, in order to satisfy her with its provisions, he had promised that the securities should not be enforced. The securities were not found among his papers after his death.—*Held*, sufficient proof that he had voluntarily destroyed them. *Ib.*

3. Ordinarily, the party alleging insanity is bound to prove it. Insanity is not presumed. *Frazer* v. *Frazer*, 260.

4. But, general insanity being proved, the *onus* is upon the party setting up any act as binding to prove that it was done in a lucid interval. *Ib.*

5. The reasonableness of an act is evidence of the rationality of the actor. The fixedness of purpose to do it, is further evidence of stability, and, therefore, of rationality: but if the act is not shown to be reasonable it derives no strength from a continued purpose to do it. *Ib.*

EXECUTION.

1. A surety in a debt for which judgment is recovered against the principal is not discharged by a stay of execution, if such stay is required by statute, although it is entered as given by consent of the plaintiff. *Houston, et al.*, v. *Hurley's Adm'rs.*, 247.

2. Nor is such surety discharged by a mere stay of execution after a levy. *Ib.*

3. But if goods levied upon under the execution have been released by the creditor, without the surety's consent, the surety is discharged *pro tanto*. *Ib.*

4. A debt due under a judgment is subject to attachment. *Webster* v. *McDaniel, et al.*, 297.

5. A sale of land, in execution of a judgment on a bond accompanying a mortgage—the sale being for a part only of the debt secured by the bond and mortgage—does not discharge the mortgage as a security for the residue of the debt. *Schock* v. *Lesley*, 304.

See PREFERENCE, 2.

EXECUTORS AND ADMINISTRATORS.

1. It is no ground for relief in equity that the debtor in a judgment is deceased and that there is no personal representative of his estate. The creditor has sufficient remedy at law by raising an administration. *Cochran* v. *Cochran, et al.*, 17.

2. Bill against one charging him as *executor* for payment of a legacy, will not authorize a decree against him personally, as *devisee of land charged with the legaey*. *Cloud, Adm'r.* v. *Whiteman, Ex'r.*, 23.

3. Where a testator, domiciled in Pennsylvania, divided his real estate into eight portions and charged each of them with its excess in value over one-eighth part of his estate;—in determining the existence and amount of the excess, the amount of the personal estate of the testator is to be taken as it is ascertained by the testamentary accounts settled by the Court having jurisdiction at the domicile of the testator. *Colwell, Adm'r.* v. *Miles*, 110.

4. Lapse of time in collecting the excess is no bar, the trustees who were to pay and the executors who were to receive being the same persons. *Ib.*

5. Delay in the final settlement of testamentary accounts is not *laches*, if caused by *lis pendens*. *Ib.*

6. *It seems*, that sureties in administration, testamentary and guardian bonds, having a statutory remedy in the Orphans Court for counter security, cannot seek indemnity in a court of equity. *Jefferson* v. *Tunnell, et al.*, 135.

7. A decedent having, in his lifetime, held certain securities, which after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the Court. The absence of the papers raises no presumption of such destruction or cancellation; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient. *Gilpin, Ex'r.* v. *Chandler, et al.*, 219.

8. A bond held by a decedent at his death, though not yet due, is assets for the payment of debts, and may be sold under a decree. *Grose* v. *McMullen's Ex'rs*, 227.

9. To exonerate the personal estate of a testator from the payment of debts, it is not sufficient that the real estate be charged. It must appear from the will, either expressly or by clear implication, that the testator intended to exonerate the personal estate. *Ib.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

10. Upon the death of the party committing waste the liability to account survives against his administrators. *Fleming, Trustee* v. *Collins, Adm'r*, 230.

11. A promissory note, taken by an administrator for proceeds of land of his decedent sold under an order of the Orphans Court for the payment of debts and shewing on its face the purpose for which it was given is a trust fund. *Barwick, Adm'r* v. *White, et al.*, 284.

12. The maker of the note, by whom it had been paid, is not a necessary party to a bill to enforce the trust. Neither are the heirs or devisees of the decedent, whose land was sold, necessary parties. The fund belongs to the administrator *de bonis non* of the decedent. *Ib.*

13. Upon the death of the administrator, the assignment of the note by his administratrix to pay his debts is a breach of trust and a legal fraud, for which the administratrix and her assignee are liable in equity. *Ib.*

14. Goods bequeathed in trust came to the hands of the administrator c. t. a. who filed an inventory and appraisement of them and charged himself with their value in an administration account. *Held*, that they were not thereby converted, so as to be subjected to execution for the administrator's debts. *Robinson* v. *Burton*, 314.

15. Executors gave a bond for payment of a legacy, subject to an agreement that any legal and proper abatement from the legacy, if ascertained before the bond became due and payable, should be credited; otherwise, that the bond should be absolute. Upon a failure to ascertain the amount to be abated from the legacy, before the bond became due and payable,—*held*, that the failure being through default of the executors a court of equity will not extend the time for ascertaining the abatement. *Kersey, et al.* v. *Bailey, et al.*, 328.

See EQUITABLE CONVERSION.

EXONERATION.

1. To exonerate the personal estate of a testator from the payment of debts, it is not sufficient that the real estate be charged. It must appear from the will, either expressly or by clear implication, that the testator intended to exonerate the personal estate. *Grose* v. *McMullen's Ex'rs*, 227.

EXONERATION—*Continued.*

2. The testator, at his death, held a bond for $7,000.00 not due for a number of years. By his will he bequeathed to his wife an annuity of $420.00, corresponding with the annual interest on the bond; and also gave some pecuniary legacies at her decease. His lands were charged with debts, and a portion of them directed to be sold for the payment of debts.—*Held*, not sufficient to exonerate the bond from liability for a deficiency after applying the residue of the personal estate and the proceeds of lands directed to be sold. *Ib.*

See CHARGE, 3—(1), (2), (3).

FORFEITURES.

1. Principle of relief in equity against forfeitures stated. *Kersey et al.*, v. *Bailey, et al.*, 328.

2. Executors gave a bond for payment of a legacy, subject to an agreement that any legal and proper abatement from the legacy, if ascertained before the bond became due and payable, should be credited; otherwise that the bond should be absolute. Upon a failure to ascertain the amount to be abated from the legacy, before the bond became due and payable,—*held*, that the failure being through default of the executors a court of equity will not extend the time for ascertaining the abatement. *Ib.*

FRAUD.

1. G. T., a guardian, being indebted to his ward, at the solicitation of his sureties, gave his judgment bond to three of them to indemnify them and their co-sureties; and, for the same purpose, assigned to them certain debts, which debts the sureties collected and held for indemnity.—*Held*, that the transaction was fraudulent and void, as against creditors of G. T. afterward recovering judgment. *Jefferson* v. *Tunnell, et al.*, 135.

2. A bond executed in *blank* by H. and sureties, to enable him to raise $300 by loan from B. was filled up and delivered, without their knowledge, to C. & N. for $354.48, in payment of a debt. *Held*, fraudulent and void as to the sureties. *Hastings, et al.*, v. *Clendaniel, et al.*, 165.

3. A purchaser, under a contract for the sale of land, who has accepted a deed and entered into possession will, nevertheless, be relieved in equity against a defect of title afterward discovered by him, *if fraud in the sale was practiced upon him by the vendor.* Otherwise, *it seems*, if the deed were accepted *in the absence of fraud.* *Houston, et al.*, v. *Hurley's adm'rs*, 247.

FRAUD—*Continued.*

4. The right to rescind a contract for fraud must be exercised promptly after the discovery of it. *Ib.*

5. Upon the death of an administrator, who in his lifetime took a promissory note for a debt due his decedent, the assignment of the note by his administratrix to pay his debts is a breach of trust and a legal fraud, for which the administratrix and her assignee are liable in equity. *Barwick, adm'r,* v. *White, et al.,* 284.

See ANSWER, 2.

FRAUDS.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

1. The *oldest* judgment creditor at law, having obtained a decree in equity setting aside a fraudulent conveyance to the debtor's children of land purchased by him prior to the recovery of the judgment, is not entitled to a preference in equity in the distribution of the proceeds of the land sold under a decree. In such case the equitable doctrine of distributing assets among creditors *pari passu* applies. *Newell* v. *Morgan,* 20.

2. Heirs at law relieved, in equity, against a fraudulent conveyance by their ancestor. *Dutton* v. *Jackson,* 86.

3. A conveyance of land having been made by a husband, pending a proceeding for divorce, but with a reserved possession in the husband and upon a secret trust for his own use, the conveyance being for the purpose of defeating his wife's claim to alimony and the grantee being privy to the fraud,—a court of equity will, after the death of the grantor, hold such conveyance void against his heirs at law. *Ib.*

4. In such case the deed is not a mere voluntary conveyance, and as such valid and conclusive upon the heirs at law; but, being fraudulently made and not intended to pass title, it is void, as well against heirs as against creditors. *Ib.*

5. A voluntary conveyance, though without a fraudulent intent, is void, as against creditors, under the statute of 13 Elizabeth. *Logan, et al.* v. *Brick, et al.,* 206.

6. Such a conveyance is void *if it tend to hinder and delay creditors,* though it may not otherwise injure them. *Ib.*

7. The answers of the grantor and grantee in a voluntary conveyance, denying a fraudulent intent, though responsive to the

FRAUDULENT CONVEYANCE—*Continued.*

bill, is no defence, since such conveyance is, as against creditors, a fraud in law, irrespective of the intent of the parties. *Ib.*

8. A conveyance being held fraudulent and void as against creditors, certain mortgages of the property conveyed, taken by the vendor by way of consideration, were nevertheless held good in the hands of an assignee for value without notice. *Ib.*

9. A voluntary conveyance is void as against creditors holding debts previously contracted. *Russell, et al.* v. *Thatcher, et al.*, 320.

10. A voluntary deed set aside as against creditors. *Humphries* v. *Wilson*, 331.

See VOLUNTARY CONVEYANCE.

GARNISHEE—GARNISHMENT.

1. A debt due under a judgment is subject to attachment. *Webster* v. *McDaniel, et al.*, 297.

2. An interpleader will be decreed for the relief of a judgment debtor who has been summoned as a garnishee of the debt under an attachment *fi. fa.* against the judgment creditor. *Ib.*

GIFT.

The owner of a tract of land let the complainant into possession thereof, promising to give it to him; and upon the faith of such promise the complainant built upon, improved and occupied the land. The owner died without having conveyed the same. The complainant was held entitled to be protected in equity against an ejectment, brought by the heirs at law, to recover possession of the land. *Burton* v. *Duffield*, 130.

GUARANTY.

1. B. S. held an indemnity against his indorsement of two notes of J. O. H. The notes were paid in part by money loaned to J. O. H. by W. B. H. at the request of B. S. and on his guaranty of re-payment by J. O. H. W. B. H. took for the loan the due bill of J. O. H. payable in ten days. There was no agreement by J. O. H that the indemnity held by B. S. against his indorsements should stand as a security for the loan by W. B. H. *Held*, upon the failure of J. O. H. that W. B. H. was not entitled in equity to the benefit of the indemnity to B. S.—*Held also*, that B. S. while liable under his guaranty to W. B. H. was protected by the indemnity, it being given in terms against "any loss, injury

GUARANTY—*Continued.*

or damage that might accrue to him on account or by reason of his indorsement." *Horsey* v. *Stockley*, 290.

2. In the particular case, B. S. having been discharged from liability under the guaranty, and the notes indorsed by him being paid, proceedings to enforce the indemnity were enjoined. *Ib.*

GUARDIAN AND WARD.

1. G. T., a guardian, being indebted to his ward, at the solicitation of his sureties, gave his judgment bond to three of them to indemnify them and their co-sureties; and, for the same purpose, assigned to them certain debts, which debts the sureties collected and held for indemnity.—*Held*, that the transaction was fraudulent and void, as against creditors of G. T. afterward recovering judgment. *Jefferson* v. *Tunnell, et al.*, 135.

2. *It seems*, that sureties in administration, testamentary and guardian bonds, having a statutory remedy in the Orphans Court for counter security, cannot seek indemnity in a court of equity. *Ib.*

HEIR AT LAW.

1. Heirs at law relieved, in equity, against a fraudulent conveyance by their ancestor. *Dutton* v. *Jackson*, 86.

2. A conveyance of land having been made by a husband, pending a proceeding for divorce, but with a reserved possession in the husband and upon a secret trust for his own use, the conveyance being for the purpose of defeating his wife's claim to alimony and the grantee being privy to the fraud,—a court of equity will, after the death of the grantor, hold such conveyance void against his heirs at law. *Ib.*

3. In such case the deed is not a mere voluntary conveyance, and as such valid and conclusive upon the heirs at law; but, being fraudulently made and not intended to pass title, it is void, as well against heirs as against creditors. *Ib.*

HUSBAND AND WIFE.

1. A post-nuptial agreement that the wife shall enjoy, for her sole and separate use, property to which the husband has become entitled in her right, if upon sufficient consideration and not in fraud of creditors, will be enforced in equity. *Kilby, adm'r* v. *Godwin, et al.*, 61.

HUSBAND AND WIFE—*Continued.*

2. Pending a suit in equity by the wife against her husband for enforcing an ante-nuptial contract, it was agreed by the husband as a compromise of the suit and in consideration of its dismissal, with the wife's consent, that one half part of certain funds held by him, in her right, should be for her sole and separate use; and such half part was, pursuant to the agreement, delivered to the wife's solicitor and came to her possession and was afterward, during her last sickness, disposed of by her as a *donatio causa mortis*.—*Held*, that the agreement was valid; and that the funds delivered, in pursuance of it, became the wife's separate property, and passed by her disposal of them as a *donatio causa mortis*. *Ib.*

3. A conveyance of land having been made by a husband pending a proceeding for divorce, but with a reserved possession in the husband and upon a secret trust for his own use, the conveyance being for the purpose of defeating his wife's claim to alimony and the grantee being privy to the fraud,— a court of equity will, after the death of the grantor, hold such conveyance void against his heirs, at law. *Dutton* v. *Jackson*, 86.

4. A bequest of personal property to the wife, with a devise that the real estate shall be sold and a fee simple title or titles conveyed, being of equal "tenor" with those by which the testator held the same, is not such a devise as will defeat the widow's claim of dower, or put her to an election. *Kinsey, et al.*, v. *Woodward*, 92.

5. A legacy charged upon land was bequeathed to a married woman, subject to the deduction of a book account held by the testator against her. The testator held a note of the legatee's husband, but no reference to this note was made in the bequest. The husband also became indebted to the executor of the testator for goods purchased at a vendue of the personal estate. The husband died before the wife, without having reduced the legacy into his possession and without any settlement with the executor touching the same or his own indebtedness to the estate of the testator. *Held*, that on a bill filed by the administrator of the wife (who had survived her husband and died) to recover the legacy from the devisee of the land charged, the husband's indebtedness to the estate of the testator could not be treated as payment of the legacy. *Cartmell, Adm'r* v. *Perkins*, 102.

6. The mere omission of a husband to reduce his wife's *chose in action* into his possession, for a lapse of time ordinarily sufficient to raise a presumption of payment, does not raise such presumption so as to bar the wife's right, by survivorship, to recover such *chose in action* after the husband's death. *Ib.*

HUSBAND AND WIFE—*Continued.*

7. An ante-nuptial contract, not recorded, raises no equity, at the suit of a debtor to the wife *dum sola*, to restrain the collection of the debt at law by process in the name of the husband and wife. *Hill* v. *Garman, et al.*, 273.

8. Such a debtor has no interest in the contract, entitling him to set it up in equity. *Ib.*

9. Nor is the debtor at any risk in paying the debt. Such payment would protect him against any future claim by the trustee under the contract, who had not interfered to prevent the collection of the debt by the husband. *Ib.*

10. A husband, having reduced to his possession funds to which he became entitled in right of his wife, cannot subject them to a voluntary trust for the wife to the prejudice of creditors. *Russell, et al.*, v. *Thatcher, et al.*, 320.

11. A trustee having a discretion as to the time and amount of payments to be made of a trust fund for the benefit of a married woman, his refusal to make any payment is a breach of trust, against which the Court will relieve. *Collins* v. *Severson*, 324.

12. A trustee of a fund in which his wife, with others, was interested, having failed to pay over money collected by him on account of the fund.—*Held*, that the wife's share of other money, received by a succeeding trustee on account of the trust fund, was not liable for the unpaid shares of the other *cestuis que trust* in the money collected by her husband. *Jones* v. *Randel, et al.*, 326.

13. In such case, the husband's failure to pay over the money collected by him cannot be taken to be a *reductio ad possessionem* of the wife's share of trust funds then uncollected. *Ib.*

14. The wife's *chose in action*, not reduced into the husband's possession, cannot be taken for the payment of his debt, at law or in equity. *Ib.*

15. Property of the wife cannot, in equity, be taken for payment of the husband's debt without subjecting it to her equity, which, under the circumstances of this case, was sufficient to protect the whole fund. *Ib.*

See CANCELLATION, 2.

IDIOT.

See LUNACY.

INDEMNITY.

1. The grantor in a deed conveying a lot of land to R., executed a bond of indemnity to R., against a mortgage of the same lot to T.,—also against certain paramount liens affecting the land. The bond of indemnity was accompanied by a mortgage to R. of other lands, also covered by the mortgage to T. The lot conveyed to R., and also the other lands embraced in the mortgage of indemnity to him, were all sold by the sheriff under the mortgage to T.—*Held*, that R. was entitled in equity, to be indemnified for the loss of the lot, out of the proceeds of the other lands mortgaged to him for an indemnity;—that he had not, under the indemnity bond accompanying the mortgage, a sufficient remedy at law to bar relief in equity. *Reybold, et al.*, v. *Herdman, Sheriff, et al.*, 34.

2. Equity will, in some cases, decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the Court entertains bills *quia timet*. *Ib.*

3. B. S. held an indemnity against the indorsement of two notes of J. O. H. The notes were paid in part by money loaned to J. O. H. by W. B. H. at the request of B. S. and on his guaranty of re-payment by J. O. H. W. B. H. took for the loan the due bill of J. O. H. payable in ten days. There was no agreement by J. O. H. that the indemnity held by B. S. against his indorsements should stand as a security for the loan by W. B. H. *Held*, upon the failure of J. O. H. that W. B. H. was not entitled in equity to the benefit of the indemnity to B.S.—*Held also*, that B. S. while liable under his guaranty to W. B. H. was protected by the indemnity, it being given in terms against "any loss injury or damage that might accrue to him, on account or by reason of his indorsement." *Horsey* v. *Stockley*, 290.

4. In the particular case, B. S. having been discharged from liability under the guaranty, and the notes indorsed by him being paid, proceedings to enforce the indemnity were enjoined. *Ib.*

INDICTMENT.

1. Indictment under the general act against the illegal drawing of lotteries is not an adequate remedy, such as to oust the jurisdiction of a court of equity—an indictment being *punitive* only and not *preventive*. *State* v. *Maury, et al.*, 141.

2. The drawings being made under a license granted, and being invalid for irregularity only, neither an indictment nor a writ of

INDICTMENT—*Continued.*

quo warranto would lie. Adequate relief can be had only in a court of equity. *Ib.*

INDORSEMENT.

1. An agreement by a bank to credit a note with such fees as the debtor might earn as a Notary Public in protesting bills and notes for the bank does not discharge the indorser, though made without his privity. *McDowell* v. *Bank of W. & B.*, 1.

2. Under articles of association, which had been adopted as part of the charter of the bank, it was provided that so long as a stockholder might remain indebted to the bank his stock should not be transferable.—*Held*, that the defendant was not liable in damages for refusing to permit the indorser, while still remaining liable on his indorsement, to transfer his stock on the books of the bank. *Ib.*

3. The maker of a promissory note, after a judgment recovered against the indorser, not a competent witness for the indorser in a suit in equity to restrain the collection of the judgment. *Ib.*

4. A bank, being the holder of a promissory note protested for non-payment, has not the right to credit it with deposits made by the debtor to his account as a Justice of the Peace; and its omission to do so does not discharge the indorser. *Ib.*

5. An indorser of a promissory note, after its maturity and his liability on it had become fixed, joined with the maker of the note in a bond giving further time, at his request.—*Held*, that he was surety on the bond and not a principal. *Merriken* v. *Godwin, et al.*, 236.

6. B. S. held an indemnity against his indorsement of two notes of J. O. H. The notes were paid in part by money loaned to J. O. H. by W. B. H. at the request of B. S. and on his guaranty of re-payment by J. O. H. W. B. H. took for the loan the due bill of J. O. H. payable in ten days. There was no agreement by J. O. H. that the indemnity held by B. S. against his indorsements should stand as a security for the loan by W. B. H.—*Held*, upon the failure of J. O. H. that W. B. H. was not entitled in equity to the benefit of the indemnity to B. S.—*Held also*, that B. S. while liable under his guaranty to W. B. H. was protected by the indemnity, it being given in terms against "any loss, injury or damage that might accrue to him, on account or by reason of his indorsement." *Horsey* v. *Stockley*, 290.

7. In the particular case, B. S. having been discharged from liability under the guaranty, and the notes indorsed by him being paid, proceedings to enforce the indemnity were enjoined. *Ib.*

INJUNCTION.

1. An injunction will not be granted to restrain a party, holding the legal title to an undivided share of intestate real estate, from exercising the right, attaching to such share, of accepting the intestate real estate in the Orphans Court. *Kinney* v. *Redden, et al.*, 44.

2. The owner of a tract of land let the complainant into possession thereof, promising to give it to him; and upon the faith of such promise the complainant built upon, improved and occupied the land. The owner died without having conveyed the same. The complainant was held entitled to be protected in equity against an ejectment, brought by the heir at law, to recover possession of the land. *Burton* v. *Duffield*, 130.

3. A court of equity has jurisdiction of a bill filed to restrain the further drawing of a lottery, under color of an Act of the General Assembly authorizing a lottery for raising a certain sum of money, upon the alleged ground that certain pre-requisites to the exercise of such authority, prescribed by the act, have not been complied with, and also that the authority granted has been exhausted by the drawing of lottery schemes competent to raise the required sum. Such irregular or excessive drawings is a breach of the trust confided by the act, and as such is remediable in equity. The Court has also jurisdiction for the purpose of discovery, in order to ascertain whether the authority granted has been exhausted. *State* v. *Maury, et al.*, 141.

4. By an Act of the General Assembly, certain trustees were authorized to appoint a manager or managers, to institute, carry on and draw a lottery for raising a sum not exceeding $25,000, to be applied to certain public objects; the manager or managers to give bond to the State with surety to be approved by a Judge, conditioned for a faithful performance of duty in the sale of tickets and drawing of the lottery, and in paying over to the trustees, or their successors, the net proceeds thereof. All expenses were by the act directed to be paid out of the proceeds of the lottery, and the net proceeds to be paid over to the trustees, to be by them applied to the purposes of the act. A bill was filed, alleging that the trustees had exceeded their authority under the act, by undertaking to enter into a contract to grant to certain managers, appointed by them, the privilege of drawing a lottery for a term of years, in consideration of an annual sum, to be paid to the trustees for the purposes of the act; also alleging that the managers appointed had failed to give bond in conformity with the provisions of the act; also alleging that the managers had exhausted

their authority under the act by drawing more than the sum required.—*Held*, that upon such a bill a court of equity has jurisdiction to restrain the further drawing of the lottery. *Ib.*

5. Upon a bill filed against a trustee, charging mal-administration of the trust and threats of acts which, if committed, would cause irremediable injury, a receiver was appointed and an injunction ordered, on motion, without previous notice to the trustee. *Davis* v. *Browne*, 188.

6. Equity will not interfere to restrain the recovery at law of a legacy, on the ground that the legatee is indebted in a bond to the testator payable at a future day. *Hayes, Adm'r.* v. *Hayes*, 191.

7. Equity will not interfere to restrain the legatee from an action at law for the legacy, on the ground that he is in contempt for not performing a decree made in another suit for the execution of a new bond, in lieu of the original one given to the testator and since lost. *Ib.*

8. A decree against the legatee for costs in the suit to enforce the execution of a new bond, is no ground for an injunction to restrain an action at law for the legacy, since such costs could be set off in the action at law. *Ib.*

9. The cutting of timber is an injury of an irreparable nature and remediable in equity, by whomsoever committed. *Fleming, Trustee*, v. *Collins, Adm'r*, 230.

10. Equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed. *Ib.*

11. A purchaser under a contract for the sale of land accepted a deed and entered into possession in December, 1854, soon after which he discovered that the land had been sold, before the conveyance to him, for unpaid taxes; but he continued in possession until 1858, when, without eviction, he abandoned it.—*Held*, that after so long a delay he was not entitled to wholly rescind the contract;—but *held also*, that a portion of the purchase money remaining unpaid, a court of equity will restrain the collection of it until a good title be made. *Houston, et al.*, v. *Hurley's admr's*, 247.

12. Breach of an injunction against the further drawing of a lottery punished, under the circumstances, by imprisonment two weeks and until the drawings should cease. *State* v. *Eddy*, 269.

13. An ante-nuptial contract, not recorded, raises no equity, at the suit of a debtor to the wife *dum sola*, to restrain the collection

INJUNCTION—*Continued.*

of the debt at law by process in the name of the husband and wife. *Hill* v. *Garman, et al.*, 273.

14. Injunction granted to restrain the collection of a promissory note, the consideration of which had failed. *Ewing* v. *Chase, adm'r*, 278.

15. An injunction, granted on petition, being dissolved for want of a bill filed at the ensuing term, an action at law was brought on the injunction bond, and judgment taken subject to an agreement of counsel that it should await the result of the chancery suit, a bill then having been filed. Upon a final decree sustaining the bill, further proceeding under the judgment on the injunction bond was restrained. *Robinson* v. *Burton*, 314.

INSANITY.

1. Ordinarily, the party alleging insanity is bound to prove it. Insanity is not presumed. *Fraser* v. *Fraser*, 260.

2. But, general insanity being proved, the *onus* is upon the party setting up any act as binding to prove that it was done in a lucid interval. *Ib.*

3. By insanity is not meant a total deprivation of reason, but only an inability from defect of perception, memory and judgment, to do the act in question. *Ib.*

4. By a lucid interval is not meant a perfect restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and to do the act with such perception, memory and judgment as to make it a legal act. *Ib.*

5. The reasonableness of an act is evidence of the rationality of the actor. The fixedness of purpose to do it, is further evidence of stability, and, therefore, of rationality: but if the act is not shewn to be reasonable it derives no strength from a continued purpose to do it. *Ib.*

INSOLVENCY.

1. A debtor, being a member of an insolvent partnership, conveyed his separate real estate in satisfaction of a debt due to a separate creditor. The real estate exceeded in value, to a considerable amount, the debt for the satisfaction of which it was conveyed. *Held*, that the other creditors had an interest in the excess, and that in equity the property conveyed would be held as a security, first for the debt due to the grantee, and, as to the excess of value, for other debts. *Bailey, et al.*, v. *Kennedy et al.*, 12.

INSOLVENCY—*Continued.*

2. The real estate conveyed being the separate property of the co-partner the excess of value was bound, first, for his separate debts, and only after satisfying these was it applicable to the debts of the partnership. *Ib.*

3. A bond given by a debtor in failing circumstances, covering all his property for the benefit of preferred creditors, is contrary to the policy of the Statute against fraudulent insolvency. *Comly* v. *Waters, et al.*, 72.

4. Bequest of a part of the sum due upon an obligation to the testator,—*held* to be a specific legacy; and that, upon the insolvency of the debtor, the legatees are not entitled, in equity, to have the legacy paid out of the general assets. *Titus, Ex'r*, v. *McLanahan, et al.*, 200.

INTEREST.

A testator, after disposing of his estate in eight parts, in order to equalize the distribution of it, set a value upon the several lands devised, and charged each of them, in the hands of the devisee, with its excess in value over one equal eighth part of the whole estate—such excess to be paid, within six months after the testator's decease, to his executors as part of the residuary estate. The lands were devised to trustees for the several parties interested, the trustees being also the executors. The land sought to be charged having been devised in trust for one for life (to whom was given the rents and profits) with remainder to his children,—*held*, that the receipt by trustees of rents and profits sufficient to pay the excess does not, unless paid over to the executor, exonerate the lands, in the hands of the remainderman, from payment of the principal of the excess: otherwise as to interest on the excess accrued prior to the possession of the remainderman. *Colwell, Adm'r* v. *Miles*, 110.

INTERNAL REVENUE.

By Section 94 of the Act of Congress, entitled "An Act to provide Internal Revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th 1864, an *ad valorem* duty of five per cent. was imposed upon "all manufactures of cotton, wool, silk, &c.," *or of other materials not in this act provided for.—Held*, that molasses made from sorghum, not being otherwise provided for in the act, was subject to the *ad valorem* duty of five per cent. *Pickering* v. *Day*, 333.

See COLLECTOR OF INTERNAL REVENUE.

INTERPLEADER.

An interpleader may, in a proper case, be decreed for the relief of a judgment debtor who has been summoned as a garnishee of the debt under an attachment *fi. fa.* against the judgment creditor. *Webster* v. *McDaniel, et al.*, 297.

INTERROGATORIES.

After argument of a cause at the final hearing, leave granted, under the circumstances, to exhibit interrogatories to take additional testimony and for a further hearing. *Southard* v. *Price*, 233.

INTESTATE REAL ESTATE.

An injunction will not be granted to restrain a party, holding the legal title to an undivided share of intestate real estate, from exercising the right, attaching to such share, of accepting the intestate real estate in the Orphans Court. *Kinney* v. *Redden, et al.*, 44.

IRREPARABLE INJURY.

See INJUNCTION, 9.

ISSUE.

1. An inquiry, whether there was any and what consideration existing at the time of the execution of a certain writing obligatory, does not present a sufficiently distinct fact to be the subject of an issue out of Chancery, for trial by a jury. *Comly* v. *Waters, et al.*, 72.

2. The Chancellor will not, upon application, order issues for trial by a jury respecting facts not material, in his judgment, to a decree in the cause. *Ib.*

JUDGMENT.

1. It is no ground for relief in equity that the debtor in a judgment is deceased and that there is no personal representative of his estate. The creditor has sufficient remedy at law by raising an administration. *Cochran* v. *Cochran, et al.*, 17.

2. The *oldest* judgment creditor at law, having obtained a decree in equity setting aside a fraudulent conveyance to the debtor's children of land purchased by him prior to the recovery of the judgment, is not entitled to a preference in equity in the distribution of the proceeds of the land sold under a decree. In such case the equitable doctrine of distributing assets among creditors *pari passu* applies. *Newell* v. *Morgan*, 20.

3. Equity will recognize and give effect to a judicial preference

JUDGMENT—*Continued.*

at law by judgment or execution; but such judicial preference arises, not out of the speed of the parties in pressing their claims at law but out of their having obtained a *prior legal lien* upon the property in controversy. *Ib.*

4. An interpleader may, in a proper case, be decreed for the relief of a judgment debtor who has been summoned as a garnishee of the debt under an attachment *fi. fa.* against the judgment creditor. *Webster* v. *McDaniel, et al.*, 297.

5. A debt due under a judgment is subject to attachment *Ib.*

6. A judgment debtor, having recovered a judgment in another Court against his creditor, is entitled to relief in equity by a decree for set off. *Ib.*

7. Though both judgments are legal demands equity will relieve, because they are not judgments recovered in the same Court, so that they could be set off at law under the equitable control of the Court over its own judgments: and there is, therefore, no remedy but in equity. *Ib.*

8. A sale of land, in execution of a judgment on a bond accompanying a mortgage—the sale being for a part only of the debt secured by the bond and mortgage—does not discharge the mortgage as a security for the residue of the debt. *Schock* v. *Lesley*, 304.

9. I. G. executed and delivered to her son, F. R. G., a bond for $7,100. Afterward she made voluntary conveyance of her real estate to other children. After her death a judgment upon the bond was recovered against her administrator.—*Held*, that in equity the real estate was bound by the judgment, irrespective of of the question whether the bond for which it was recovered was voluntary or not. *Garden, Exr'x*, v. *Derrickson, et al.*, 386.

JURISDICTION.

1. It is no ground for relief in equity that the debtor in a judgment is deceased and that there is no personal representative of his estate. The creditor has sufficient remedy at law by raising an administration. *Cochran* v. *Cochran, et al.*, 17.

2. Where a testator, domiciled in Pennsylvania, divided his real estate into eight portions and charged each of them with its excess in value over one eighth part of his estate,—in determining the existence and amount of the excess, the amount of the personal estate of the testator is to be taken as it is ascertained by the tes-

JURISDICTION—*Continued.*

tamentary accounts settled by the Court having jurisdiction at the domicile of the testator. *Colwell, Adm'r*, v. *Miles*, 111.

3. The land sought to be charged, having been devised in trust for one for life (to whom was given the rents and profits) with remainder to his children, the omission of the trustees to collect the excess from the tenant for life is no bar to relief against the remainderman for the principal of the excess. *Ib.*

4. A court of equity has jurisdiction of a bill filed to restrain the further drawing of a lottery, under color of an Act of the General Assembly authorizing a lottery for raising a certain sum of money, upon the alleged ground that certain pre-requisites to the exercise of such authority, prescribed by the act, have not been complied with, and also that the authority granted has been exhausted by the drawing of lottery schemes competent to raise the required sum. Such irregular or excessive drawings is a breach of the trust confided by the act, and as such is remediable in equity. The Court has also jurisdiction for the purpose of discovery, in order to ascertain whether the authority granted has been exhausted. *State* v. *Maury, et al.*, 141.

5. By an Act of the General Assembly certain trustees were authorized to appoint a manager or managers, to institute, carry on and draw a lottery for raising a sum not exceeding $25,000, to be applied to certain public objects; the manager or managers to give bond to the State with surety to be approved by a Judge, conditioned for a faithful performance of duty in the sale of tickets and drawing of the lottery, and in paying over to the trustees, or their successors, the net proceeds thereof. All expenses were by the act directed to be paid out of the proceeds of the lottery, and the net proceeds to be paid over to the trustees, to be by them applied to the purposes of the act. A bill was filed, alleging that the trustees had exceeded their authority under the act by undertaking to enter into a contract to grant to certain managers, appointed by them, the privilege of drawing a lottery for a term of years, in consideration of an annual sum, to be paid to the trustees for the purposes of the act; also alleging that the managers appointed had failed to give bond in conformity with the provisions of the act; also alleging that the managers had exhausted their authority under the act by drawing more than the sum required.—*Held*, that upon such a bill a court of equity has jurisdiction to restrain the further drawing of the lottery. *Ib.*

6. Indictment under the general act against the illegal drawing

of lotteries is not an adequate remedy, such as to oust the jurisdiction of a court of equity—an indictment being *punitive* only and not *preventive*. *Ib.*

7. The drawings being made under a license granted, and being invalid for irregularity only, neither an indictment nor a writ of *quo warranto* would lie. Adequate relief can be had only in a court of equity. *Ib.*

8. Equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed. *Fleming, Trustee*, v. *Collins, Adm'r*, 230.

9. An equitable interest vests in the beneficiaries of a charitable use, from the time of their appointment or selection, such as entitles them to enforce their equitable rights. *State* v. *Griffith*, 392.

10. The jurisdiction of the Court of Chancery in this State to protect and enforce charitable uses, considered at large and sustained. *Ib.*

11. Such jurisdiction, in England, existed in the Court of Chancery prior to the Statute of 43 Elizabeth, and is not founded on that Statute. *Ib.*

12. The jurisdiction of the Court of Chancery to enforce such charitable uses as were void or defective at common law was not derived from the Statute of 43 Elizabeth, but existed prior to and independently of that Statute. *Griffith* v. *State*, (*Appendix*) 421.

13. The jurisdiction over charitable uses exercised by the English Court of Chancery is by the constitution and laws of this State, vested in its Court of Chancery. *Ib.*

LACHES.

1. Delay in the final settlement of testamentary accounts is not *laches*, if caused by *lis pendens*. *Colwell, adm'r.*, v. *Miles*, 110.

2. The complainant and the defendant, A. entered into a parol contract for an exchange of lands—the complainant agreeing to convey a tract of woodland and pay $300.00 in cash—the defendant, A. agreeing to convey, together with his wife, a tract of marsh, the title of which was held by his wife. Possession was mutually delivered. It was agreed that the parties should meet at the house of G. F. to execute conveyances; but such meeting was delayed and never took place. The defendant, A. cut off the timber from the woodland delivered into his possession under the contract.

LACHES—*Continued.*

Afterward the defendant, A., without any tender of performance on his part, or demand upon the complainant for the execution of the contract, sold and conveyed the marsh to the defendant, I.—On bill filed by the complainant for a specific performance,—*held*, that the defendant, A. was not entitled to abandon the contract and to re-sell the marsh, without first tendering to the complainant a deed for the marsh and demanding performance on his part; that, under the circumstances, the complainant was not in *laches*. *Burton* v. *Adkins, et al.*, 125.

3. A purchaser under a contract for the sale of land accepted a deed and entered into possession in December, 1854, soon after which he discovered that the land had been sold, before the conveyance to him, for unpaid taxes; but he continued in possession until 1858, when, without eviction, he abandoned it.—*Held*, that after so long delay he was not entitled to wholly rescind the contract; but *held also*, that a portion of the purchase money remaining unpaid, a court of equity will restrain the collection of it until a good title be made. *Houston, et al., Hurley's Adm'rs.*, 247.

4. The omission of a collector of public revenue to remove a deputy collector after knowledge of default by the latter, does not discharge the sureties of the deputy collector. *Pickering* v. *Day*, 333.

See LAPSE OF TIME.

SPECIFIC PERFORMANCE, 1, 2, 3.

LAPSE OF TIME.

1. A legacy charged upon land and payable by the devisee of the land is a trust, falling within the exclusive jurisdiction of courts of equity, and as such is not subject to the equitable defence of lapse of time, by analogy to the Statute of Limitations; otherwise, of a legacy payable by the executor or administrator out of the personal estate, and which is recoverable both at law and in equity. *Cartmell, Adm'r.*, v. *Perkins*, 102.

2. The mere omission of a husband to reduce his wife's *chose in action* into his possession, for a lapse of time ordinarily sufficient to raise a presumption of payment, does not raise such presumption, so as to bar the wife's right, by survivorship, to recover such *chose in action* after the husband's death. *Ib.*

3. Lapse of time does not bar a *direct* trust as between the trustee and *cestui que trust*; otherwise, as to *constructive* trusts. *Ib.*

LAPSE OF TIME—*Continued.*

4. Where a testator divided his real estate into eight portions and charged each of them with its excess in value over one eighth part of his estate,—*Held*, that lapse of time in collecting the excess is no bar, the trustees who were to pay and the executors who were to receive being the same persons. *Colwell, Adm'r*, v. *Miles*, 110.

See LACHES.

LEGACY AND LEGATEE.

1. Bill against one charging him as *executor* for payment of a legacy, will not authorize a decree against him personally, as *devisee of land charged with the legacy*. *Cloud, Adm'r*, v. *Whiteman, Ex'r*, 23.

2. The prayer for general relief does not sustain such a decree. *Ib.*

3. A bequest of personal property to the wife, with a devise that the real estate shall be sold and a fee simple title or titles conveyed, being of equal "tenor" with those by which the testator held the same, is not such a devise as will defeat the widow's claim of dower, or put her to an election. *Kinsey, et al.*, v. *Woodward*, 92.

4. A legacy charged upon land was bequeathed to a married woman, subject to the deduction of a book account held by the testator against her. The testator held a note of the legatee's husband, but no reference to this note was made in the bequest. The husband also became indebted to the executor of the testator for goods purchased at a vendue of the personal estate. The husband died before the wife, without having reduced the legacy into his possession and without any settlement with the executor touching the same or his own indebtedness to the estate of the testator.—*Held*, that on a bill filed by the administrator of the wife (who had survived her husband and died) to recover the legacy from the devisee of the land charged, the husband's indebtedness to the estate of the testator could not be treated as payment of the legacy. *Cartmell, Adm'r*, v. *Perkins*, 102.

5. A legacy charged upon land, and payable by the devisee of the land, is a trust, falling within the exclusive jurisdiction of courts of equity, and as such is not subject to the equitable defence of lapse of time, by analogy to the Statute of Limitations; otherwise, of a legacy payable by the executor or administrator out of the personal estate, and which is recoverable both at law and in equity. *Ib.*

LEGACY AND LEGATEE—*Continued.*

6. A legacy, presently payable, cannot be set off in equity against a debt of the legatee to the estate, not yet due. *Hayes, Adm'r* v. *Hayes*, 191.

7. Equity will not interfere to restrain the recovery at law of a legacy, on the ground that the legatee is indebted in a bond to the testator payable at a future day. *Ib.*

8. Equity will not interfere to restrain the legatee from an action at law for the legacy, on the ground that he is in contempt for not performing a decree made in another suit for the execution of a new bond, in lieu of the original one given to the testator and since lost. *Ib.*

9. A decree against the legatee for costs in the suit to enforce the execution of a new bond, is no ground for an injunction to restrain an action at law for the legacy, since such costs could be set off in the action at law. *Ib.*

10. Bequest of a part of the sum due upon an obligation to the testator,—*held* to be a specific legacy; and that, upon the insolvency of the debtor, the legatees are not entitled, in equity, to have the legacy paid out of the general assets. *Titus, Ex'r*, v. *McLanahan, et al.*, 200.

11. Executors gave a bond for payment of a legacy, subject to an agreement that any legal and proper abatement from the legacy, if ascertained before the bond became due and payable, should be credited; otherwise, that the bond should be absolute. Upon a failure to ascertain the amount to be abated from the legacy, before the bond became due and payable,—*held*, that the failure being through default of the executors a court of equity will not extend the time for ascertaining the abatement. *Kersey, et al.*, v. *Bailey, et al.*, 328.

See WILL.

LIEN.

1. Equity will recognize and give effect to a judicial preference at law by judgment or execution; but such judicial preference arises, not out of the speed of the parties in pressing their claims at law, but out of their having obtained a *prior legal lien* upon the property in controversy. *Newell* v. *Morgan*, 20.

2. The proceeds of lands sold under a mortgage are applicable only to liens and incumbrances against the mortgagor, and not to liens paramount to his title. *Reybold, et al.*, v. *Herdman, Sheriff et al.*, 34.

LIQUIDATED DAMAGES.

A vendor of certain store goods agreed to take them back, if unsold within one year, or to make good the loss upon a re-sale. His bond for $700.00 given subject to a written defeasance declaring it to be for the "security and safety of a forfeiture to the same amount, which the vendor stood bound for in an agreement for the purchase, &c.,"—*held* not to have been given for stipulated damages but as a security for loss actually sustained by vendor's refusal to take the goods back. *Jester* v. *Murphy* 171.

LIS PENDENS.

Delay in the final settlement of testamentary accounts is not *laches*, if caused by *lis pendens*. *Colwell, Adm'r*, v. *Miles*, 110.

LOTTERY.

1. A court of equity has jurisdiction of a bill filed to restrain the further drawing of a lottery, under color of an Act of the General Assembly authorizing a lottery for raising a certain sum of money, upon the alleged ground that certain pre-requisites to the exercise of such authority, prescribed by the act, have not been complied with, and also that the authority granted has been exhausted by the drawing of lottery schemes competent to raise the required sum. Such irregular or excessive drawings is a breach of the trust confided by the act, and as such is remediable in equity. The Court has also jurisdiction for the purpose of discovery, in order to ascertain whether the authority granted has been exhausted. *State* v. *Maury, et al.*, 141.

2. By an Act of the General Assembly certain trustees were authorized to appoint a manager or managers, to institute, carry on and draw a lottery for raising a sum not exceeding $25,000, to be applied to certain public objects; the manager or managers to give bond to the State, with surety to be approved by a Judge, conditioned for a faithful performance of duty in the sale of tickets and drawing of the lottery, and in paying over to the trustees, or their successors, the net proceeds thereof. All expenses were by the act directed to be paid out of the proceeds of the lottery, and the net proceeds to be paid over to the trustees, to be by them applied to the purposes of the act. The bill was filed, alleging that the trustees had exceeded their authority under the act, by undertaking to enter into a contract to grant to certain managers, appointed by them, the privilege of drawing a lottery for a term of years, in consideration of an annual sum, to be paid to the trustees for the purposes of the act; also alleging that the managers

LOTTERY—*Continued.*

appointed had failed to give bond in conformity with the provisions of the act; also alleging that the managers had exhausted their authority under the act by drawing more than the sum required.—*Held*, that upon such a bill a court of equity has jurisdiction to restrain the further drawing of the lottery. *Ib.*

3. Indictment under the general act against the illegal drawing of lotteries is not an adequate remedy, such as to oust the jurisdiction of a court of equity—an indictment being *punitive* only and not *preventive*. *Ib.*

4. The drawings being made under a license granted, and being invalid for irregularity only, neither an indictment nor a writ of *quo warranto* would lie. Adequate relief can be had only in a court of equity. *Ib.*

LUNACY.

See INSANITY.

MARRIAGE—MARRIED WOMAN.

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE, 1, 2, 7, 8, 9.

MARSHALING ASSETS.

1. A debtor, being a member of an insolvent partnership, conveyed his separate real estate in satisfaction of a debt due to a separate creditor. The real estate exceeded in value, to a considerable amount, the debt for the satisfaction of which it was conveyed.—*Held*, that the other creditors had an interest in the excess, and that in equity the property conveyed would be held as a security, first for the debt due to the grantee, and, as to the excess of value, for other debts. *Bailey et al.*, v. *Kennedy, et al.*, 12.

2. The real estate conveyed being the separate property of the co-partner the excess of value was bound, first, for his separate debts, and only after satisfying these was it applicable to the debts of the partnership. *Ib.*

3. A deficiency of personal estate to pay the debts of a decedent having been made up by devisees of the residuary real estate, relief granted by marshaling assets. *Grose* v. *McMullen's Ex'rs*, 227.

MARSHALING SECURITIES.

1. The assignee of certain mortgages, having a collateral security for money advanced upon the mortgages, was required, for the benefit of junior creditors against the mortgaged property, first to exhaust his remedy upon the collateral security. *Logan et al.*, v. *Brick et al.*, 206.

2. A creditor having the security of two funds out of which he can satisfy his debt, upon one of which only another creditor has a junior lien, will be compelled in equity to resort first to the fund which the junior creditor cannot reach. *Ib.*

MISTAKE.

Mistake, to avoid an agreement, must be a mistake, not of *law* but of *fact*; and it must be a plain mistake, clearly made out by satisfactory proof—not resting upon evidence loose, equivocal or contradictory. *Pickering* v. *Day*, 333.

MORTGAGE.

1. The proceeds of lands sold under a mortgage are applicable only to liens and incumbrances against the mortgagor, and not to liens paramount to his title. *Reybold et al.*, v. *Herdman, Sheriff, et al.*, 34.

2. The grantor in a deed conveying a lot of land to R., executed a bond of indemnity to R., against a mortgage of the same lot to T.—also against certain paramount liens affecting the land. The bond of indemnity was accompanied by a mortgage to R. of other lands, also covered by the mortgage to T. The lot conveyed to R., and also the other lands embraced in the mortgage of indemnity to him, were all sold by the sheriff under the mortgage to T. *Held*, that R. was entitled, in equity, to be indemnified for the loss of the lot, out of the proceeds of the other lands mortgaged to him for an indemnity;—that he had not, under the indemnity bond accompanying the mortgage, a sufficient remedy at law to bar relief in equity. *Ib.*

3. A sale of land in execution of a judgment on a bond accompanying a mortgage—the sale being for a part only of the debt secured by the bond and mortgage—does not discharge the mortgage as a security for the residue of the debt. *Schock* v. *Lesley*, 304.

4. C. S. having purchased from A. V. L. a farm, assigned to him, as the consideration therefor, a bond and mortgage for $4500, executed by J. F. payable in nine annual installments, of $500

MORTGAGE—*Continued.*

each. At the same time, C. S. gave to A. V. L his own bond and mortgage for $1500, made payable in three installments of $500 each, to correspond with the first three installments of the assigned mortgage, and took from A. V. L. a power of attorney, authorizing him "to collect" the first three installments of the assigned bond and mortgage, as an indemnity against his own bond and mortgage:—*Held that,*

(1.) Upon the true construction of the agreement of the parties and of the power of attorney, C. S. was authorized to collect the first three installments of the assigned bond and mortgage by execution of a judgment entered on the bond, and not alone by voluntary payments from the debtor.

(2.) Independently of express agreement and on principles of general equity, C. S. being a surety for the first three installments, was entitled, to the extent of payments which had been made by him, to the benefit of all securities in A. V. L's. hands. *Ib.*

MORTMAIN.

1. Prior to the English Statute of 9 Geo. II, charitable uses in England were subject to no restriction. *State* v. *Griffith*, 392.

2. The English mortmain acts did not extend to the British colonies. *Ib.*

3. The Delaware Statute of 17 Geo. II, for the relief of religious societies, &c., considered; its history and objects. The prohibitions in this statute against testamentary gifts of real estate to religious societies do not affect charitable uses generally. *Ib.*

4. The English Statute of Mortmain of 9 George II is not in force in this State. *Griffith* v. *State*, (*Appendix*) 421.

5. The third section of the Statute of this State which prohibits devises of lands to religious societies, except in the mode therein prescribed, does not apply to devises to charitable uses generally. *Ib.*

NEGLIGENCE.

1. Mere negligence of a trustee, as well as his active default, may be a breach of trust. *Richards, Trustee* v. *Seal, Adm'r.* 266.

2. Ignorance of the act or default of a co-trustee is no excuse, if that ignorance results from neglect. *Ib.*

NOTICE.

Upon a bill filed against a trustee, charging mal-administration of the trust and threats of acts which, if committed, would cause irremediable injury, a receiver was appointed and an injunction ordered, on motion, without previous notice to the trustee. *Davis* v. *Browne*, 188.

OFFICE.

See BOND, 17, 18, 19, 20.

OFFICIAL BOND.

See BOND, 17, 18, 19, 20.

ONUS PROBANDI.

See EVIDENCE V.

ORPHANS COURT.

An injunction will not be granted to restrain a party, holding the legal title to an undivided share of intestate real estate, from exercising the right, attaching to such share, of accepting the intestate real estate in the Orphans Court. *Kinney* v. *Redden, et al.*, 44.

PARTIES.

1. Parties cla;ming separate and distinct interests in the subject matter of the suit cannot be joined as complainants in the same bill. But, in such case, if one only be entitled to relief, the Court may grant leave to amend the bill by striking out the name of the complainant who is not entitled to relief. *Reybold et al*, v. *Herdman, Sheriff, et al.*, 34.

2. Where a testator, domiciled in Pennsylvania, divided his real estate into eight portions and charged each of them with its excess in value over one eighth part of his estate,—*Held*, on a bill filed to charge the lands in Delaware with the excess, that the persons beneficially interested in the excess are not necessary parties. *Colwell, Adm'r* v. *Miles*, 110.

3. In a suit to enforce a constructive trust of a note taken by an administrator for a debt due his decedent, the suit being instituted after the administrator's death, the maker of the note, by whom it has been paid, is not a necessary party. Neither are the heirs or devisees of the decedent. The fund belongs to the administrator of the decedent. *Barwick, Adm'r* v. *White, Adm'x, et al.*, 284.

PARTITION.

Where a testator, domiciled in Pennsylvania, divided his real estate into eight portions and charged each of them with its excess in value over one eighth part of his estate.—*Held*, that the charge of the excess, being upon an undivided share of certain lands, is not discharged by proceedings for partition, under which the real estate comes to be held in possession by the devisee in severalty. *Colwell, Adm'r* v. *Miles*, 110.

PARTNERS AND PARTNERSHIP.

1. A debtor, being a member of an insolvent partnership, conveyed his separate real estate in satisfaction of a debt due to a separate creditor. The real estate exceeded in value, to a considerable amount, the debt for the satisfaction of which it was conveyed.—*Held*, that the other creditors had an interest in the excess, and that in equity the property conveyed would he held as a security, first for the debt due to the grantee, and, as to to the excess of value, for other debts. *Bailey, et al.* v. *Kennedy, et al.*, 12.

2. The real estate conveyed being the separate property of the co-partner, the excess of value was bound, first, for his separate debts, and only after satisfying these was it applicable to the debts of the partnership. *Ib.*

PAYMENT.

1. A legacy charged upon land was bequeathed to a married woman, subject to the deduction of a book account held by the testator against her. The testator held a note of the legatee's husband, but no reference to this note was made in the bequest. The husband also became indebted to the executor of the testator for goods purchased at a vendue of the personal estate. The husband died before the wife, without having reduced the legacy into his possession and without any settlement with the executor touching the same or his own indebtedness to the estate of the testator. *Held*, that on a bill filed by the administrator of the wife (who had survived her husband and died) to recover the legacy from the devisee of the land charged, the husband's indebtedness to the estate of the testator could not be treated as payment of the legacy. *Cartmell, Adm'r* v. *Perkins*, 102.

2. An ante-nuptial contract not having been recorded,—*held*, that payment by a debtor to the wife *dum sola* would protect him against any future claim by the trustee under the contract, who had not interfered to prevent the collection of the debt by the husband. *Hill* v. *Garman, et al.*, 273.

PAYMENT—*Continued.*

3. A sale of land, in execution of a judgment on a bond accompanying a mortgage—the sale being for a part only of the debt secured by the bond and mortgage—does not discharge the mortgage as a security for the residue of the debt. *Schock* v. *Lesley*, 304.

PERPETUITY.

1. Charitable uses are not within the rule of law against perpetuities. *State* v. *Griffith*, 392.

2. A devise of real estate, with a direction that the same be not sold but rented—"the proceeds arising from such rents" to be applied to certain charitable uses—*held*, not to be within the law against perpetuities. *Ib.*

3. The rule of law against perpetuities is not applicable to trusts for charity. *Griffith* v. *State*, (*Appendix*) 421.

PLEADING—See DECREE, 1, 2, 3.

POWER.

1. A devise to certain charitable uses of a fund, to be distributed "by agents, to be appointed by the Orphans Court or the Levy Court of Kent County, as may be deemed most proper," is not void for uncertainty as to which one of the two Courts shall appoint the agents. Either Court may exercise the power of appointment. If both refuse, this Court will appoint. So, were the power of appointment void for uncertainty, this Court would have power to create the necessary agency. *State* v. *Griffith*, 392.

2. Where a power of appointment is vested in one of two persons or bodies, either may exercise it; and the one first exercising it does so to the exclusion of the other. *Griffith* v. *State*, (*Appendix*) 421.

POWER OF ATTORNEY.

C. S. having purchased from A. V. L. a farm, assigned to him as the consideration therefor, a bond and mortgage for $4500, executed by J. F. payable in nine annual installments, of $500 each. At the same time, C.S. gave to A. V. L. his own bond and mortgage for $1500, made payable in three installments of $500 each, to correspond with the first three installments of the assigned mortgage, and took from A. V. L. a power of attorney, authorizing him "to collect" the first three installments of the assigned bond and mortgage, as an indemnity against his own bond and mortgage:—*Held that*,

POWER OF ATTORNEY—*Continued.*

(1) Upon the true construction of the agreement of the parties and of the power of attorney, C. S. was authorized to collect the first three installments of the assigned bond and mortgage by execution of a judgment entered on the bond, and not alone by voluntary payments from the debtor.

(2) Independently of express agreement and on principles of general equity, C. S. being a surety for the first three installments, was entitled, to the extent of payments which had been made by him, to the benefit of all securities in A. V. L.'s hands. *Schock* v. *Lesley*, 304.

PRACTICE.

I. *Attachment for Contempt.*

Breach of an injunction against the further drawing of a lottery punished, under the circumstances, by imprisonment two weeks and until the drawings should cease. *State* v. *Eddy*, 269.

II. *Bills of review.*

Practice as to rehearings and bills of review. *Cochran* v. *Couper, Adm'r*, 27.

III. *Decree.*

1. The relief granted in equity must be according to the case made by the bill. *Cloud, Adm'r* v. *Whiteman, Ex'r*, 23.

2. A final decree, entered upon the record and signed by the Chancellor, dismissing the bill, and not directed to be without prejudice, is a bar to another bill filed between the same parties for the same subject matter. *Cochran* v. *Couper, Adm'r*, 27.

IV. *Interrogatories.*

After argument of a cause at the final hearing, leave granted, under the circumstances, to exhibit interrogatories to take additional testimony and for a further hearing. *Southard* v. *Price*, 233.

V. *Injunction.*

An injunction, granted on petition, being dissolved for want of a bill filed at the ensuing term, an action at law was brought on the injuction bond, and judgment taken subject to an agreement of counsel that it should await the result of the chancery suit, a bill then having been filed. Upon a final decree sustaining the bill, further proceeding under the judgment on the injunction bond was restrained. *Robinson* v. *Burton*, 314.

PRACTICE—*Continued.*

VI. *Issue.*

The Chancellor will not, upon application, order issues for trial by a jury respecting facts not material in his judgment, to a decree in the cause. *Comly* v. *Waters, et al.*, 72.

VII. *Parties.*

1. Parties claiming separate and distinct interests in the subject matter of the suit cannot be joined as complainants in the same bill. But, in such case, if only one be entitled to relief, the Court may grant leave to amend the bill by striking out the name of the complainant who is not entitled to relief. *Reybold, et al.*, v. *Herdman, Sheriff et al.*, 34.

2. Where a testator, domiciled in Pennsylvania, divided his real estate into eight portions and charged each of them with its excess in value over one eighth part of his estate,—*Held*, on a bill filed to charge the lands in Delaware with the excess, that the persons beneficially interested in the excess are not necessary parties. *Colwell, Adm'r*, v. *Miles*, 110.

3. In a suit to enforce a constructive trust of a note taken by an administrator for a debt due his decedent, the suit being instituted after the administrator's death, the maker of the note, by whom it has been paid, is not a necessary party. Neither are the heirs or devisees of the decedent. The fund belongs to the administrator of the decedent. *Barwick, Adm'r*, v. *White, Adm'x, et al.*, 284.

VIII. *Receiver.*

Upon a bill filed against a trustee, charging mal-administration of the trust and threats of acts which, if committed, would cause irremediable injury, a receiver was appointed and an injunction ordered, on motion, without previous notice to the trustee. *Davis* v. *Browne*, 188.

IX. *Rehearing:*

Practice as to rehearings. *Cochran* v. *Couper, Adm'r.*, 27.

PREFERENCE.

1. The *oldest* judgment creditor at law, having obtained a decree in equity setting aside a fraudulent conveyance to the debtor's children of land purchased by him prior to the recovery of the judgment, is not entitled to a preference in equity in the distribution of the proceeds of the land sold under a decree. In such case the equitable doctrine of distributing assets among creditors *pari passu* applies. *Newell* v. *Morgan*, 20.

PREFERENCE—*Continued.*

2. Equity will recognize and give effect to a judicial preference at law by judgment or execution; but such judicial preference arises, not out of the speed of the parties in pressing their claims at law but out of their having obtained a *prior legal lien* upon the property in controversy. *Ib.*

3. A debtor in failing circumstances gave his bond to one creditor to secure a debt due to such creditor, and as to the balance under a parol trust to pay certain other creditors, per schedule. *Held*, void as to the other creditors, who were not named in the bond and with whom there was no communication. *Comly* v. *Waters, et al.*, 72.

4. Such a transaction does not create a trust in favor of the creditors. The bond is revocable at the will of the obligor; and it is prohibited by the Statute of Frauds. *Ib.*

5. A bond given by a debtor in failing circumstances, covering all his property for the benefit of preferred creditors, is contrary to the policy of the Statute against fraudulent insolvency. *Ib.*

PRINCIPAL AND SURETY.

1. An agreement between the creditor and the principal debtor, in order to discharge the surety, must be such as gives time to the debtor; and it must be for a consideration. *McDowell* v. *Bank of W. & R.*, 1.

2. Sureties, not having paid the debt for which they are bound, are not creditors of their principal. *Jefferson* v. *Tunnell, et al.*, 135.

3. The surety's liability for his principal is not a valuable consideration, as against creditors of the principal, for a bond conditioned for the payment of a sum of money as a debt. *Ib.*

4. G. T., a guardian, being indebted to his ward, at the solicitation of his sureties, gave his judgment bond to three of them to indemnify them and and their co-sureties; and, for the same purpose, assigned to them certain debts, which debts the sureties collected and held for indemnity.—*Held*, that the transaction was fraudulent and void, as against creditors of G. T. afterward recovering judgment. *Ib.*

5. *It seems*, that sureties in administration, testamentary and guardian bonds, having a statutory remedy in the Orphans Court for counter security, cannot seek indemnity in a court of equity. *Ib.*

PRINCIPAL AND SURETY—*Continued.*

6. A bond executed in *blank* by H. and sureties, to enable him to raise $300 by loan from B. was filled up and delivered, without their knowledge, to C. & N. for $354.48, in payment of a debt.—*Held*, fraudulent and void as to the sureties. *Hastings, et al.* v. *Clendaniel, et al.*, 165.

7. A bond executed in *blank*, for a specific purpose, cannot be otherwise filled up, without authority of the obligors. *Ib.*

8. Such authority must be proved affirmatively, to sustain the bond. *Ib.*

9. The substitution of a new security for one in which a party became originally bound as surety does not convert him into a principal debtor. *Merriken* v. *Godwin, et al.*, 236.

10. The surety in a bond, upon tender of the debt, is entitled under the statute to an assignment of the bond, if demanded; and a refusal to make such assignment is a discharge of the surety *per se*, irrespective of the question whether, in consequence of such refusal, the surety has sustained injury. *Ib.*

11. The fact that an inequitable use might be made of the security assigned, as against the creditor, does not absolve him from making it, nor prevent the refusal of it from operating to discharge the surety. He should assign the security and afterward resist the inequitable use of it. *Ib.*

12. *Quere*: What would be the effect of proof that the assignment was sought *for the purpose* of making an inequitable use of it? *Ib.*

13. An indorser of a promissory note, after its maturity and his liability on it had become fixed, joined with the maker of the note in a bond giving further time, at his request.—*Held*, that he was surety on the bond and not a principal. *Ib.*

14. To a charge in the bill that the complainant was surety in a bond, and as such entitled, on payment, to an assignment of the bond, it is not a responsive answer to allege that he is not entitled to the equity of a surety because by an agreement made at the time of giving the bond he was precluded from the protection now sought by the assignment. Such a defence must be proved *aliunde*. *Ib.*

15. A surety in a debt for which judgment is recovered against the principal is not discharged by a stay of execution, if such stay

PRINCIPAL AND SURETY—*Continued.*

is required by statute, although it is entered as given by consent of the plaintiff. *Houston, et al.* v. *Hurley's Adm'rs*, 247.

16. Nor is such surety discharged by a mere stay of execution after a levy. *Ib.*

17. But if goods levied upon under the execution have been released by the creditor, without the surety's consent, the surety is discharged *pro tanto*. *Ib.*

18. C. S. having purchased from A. V. L. a farm assigned to him, as the consideration therefor, a bond and mortgage for $4500, executed by J. F. payable in nine annual installments, of $500 each. At the same time, C. S. gave to A. V. L. his own bond and mortgage for $1500, made payable in three annual installments of $500 each, to correspond with the first three installments of the assigned mortgage, and took from A. V. L. a power of attorney, authorizing him "to collect" the first three installments of the assigned bond and mortgage, as an indemnity against his own bond and mortgage,—

Held, that, independently of express agreement and on principles of general equity, C. S. being a surety for the first three installments, was entitled, to the extent of payments which had been made by him, to the benefit of all securities in A. V. L's. hands. *Schock* v. *Lesley*, 304.

19. The consent by a collector of Internal Revenue that a deputy collector should use in his private business public funds collected by him—such consent not being communicated and assented to by the sureties of the deputy in an official bond given to the collector—discharges the sureties. *Pickering* v. *Day*, 333.

20. An exception to the general rule as to the appropriation of payments is the case of several official bonds executed by a collector or receiver of public revenue, at different times, with distinct sets of sureties. In such case, in the absence of any appropriation of payments made by the parties, money collected under a subsequent bond will not, before it is discharged, be applied in payment of a prior one; but a court of equity will so appropriate the payments as to give each bond credit for the money due and collected under it. *Ib.*

21. An apportionment of the amounts due on several successive official bonds, respectively indorsed on the bonds and signed by the sureties therein, is conclusive in the absence of fraud or mistake. *Ib.*

PRINCIPAL AND SURETY—*Continued.*

22. The omission of a collector of public revenue to remove a deputy collector, after knowledge of default by the latter, does not discharge the sureties of the deputy collector. *Ib.*

See INDORSEMENT, 1, 4.

PROMISSORY NOTE.

1. A bank, being the holder of a promissory note protested for non-payment, has not the right to credit it with deposits made by the debtor to his account as a Justice of the Peace; and its omission to do so does not discharge the indorser. *McDowell* v. *Bank of W. & B.*, 1.

2. An agreement by the bank to credit the note with such fees as the debtor might earn as a Notary Public in protesting bills and notes for the bank does not discharge the indorser, though made without his privity. *Ib.*

3. The maker of a promissory note, after a judgment recovered against the indorser, not a competent witness for the indorser in a suit in equity to restrain the collection of the note. *Ib.*

4. An indorser of a promissory note, after its maturity and his liability on it has become fixed, joined with the maker of the note in a bond giving further time, at his request.—*Held*, that he was surety on the bond and not a principal. *Merriken* v. *Godwin, et al.*, 236.

5. Injunction granted to restrain the collection of a promissory note, the consideration of which had failed. *Ewing* v. *Chase, Adm'r.*, 278.

6. A promissory note, taken by an administrator for proceeds of land of his decedent sold under an order of the Orphans Court for the payment of debts, and shewing on its face the purpose for which it was given, is a trust fund. *Barwick, Adm'r.*, v. *White, et al.*, 284.

7. Upon the death of the administrator, the assignment of the note by his administratrix to pay his debts is a breach of trust and a legal fraud, for which the administratrix and her assignee are liable in equity. *Ib.*

8. The maker of the note, by whom it had been paid, is not a necessary party to a bill to enforce the trust. Neither are the heirs or devisees of the decedent, whose land was sold, necessary parties. The fund belongs to the administration *de bonis non* of the decedent. *Ib.*

PROMISSORY NOTE—*Continued.*

9. B S. held an indemnity against his indorsement of two notes of J. O. H. The notes were paid in part by money loaned to J. O. H. by W. B. H. at the request of B. S. and on his guaranty of re-payment by J. O. H. W. B. H. took for the loan the due bill of J. O. H. payable in ten days. There was no agreement by J. O. H. that the indemnity held by B. S. against his indorsements should stand as a security for the loan by W. B. H.—*Held*, upon the failure of J. O. H. that W. B. H. was not entitled in equity to the benefit of the indemnity to B. S.—*Held, also*, that B. S., while liable under his guaranty to W. B. H., was protected by the indemnity, it being given in terms against "any loss, injury or damage that might accrue to him, on account or by reason of his indorsement." *Horsey* v. *Stockley*, 290.

10. In the particular case, B. S. having been discharged from liability under the guaranty, and the notes indorsed by him being paid, proceedings to enforce the indemnity were enjoined. *Ib.*

11. H., being indebted to W. on a note under seal for $109, took from a third party an assignment of a note of W. for $58.83, with the knowledge of W. and with the understanding between the parties, that it would be credited against the note for $109. *Held*, that the equity to such credit attached to the note for $109, and followed it into the hands of an assignee, though without notice. *Hall* v. *Hickman, et al.*, 318.

PURCHASER FOR VALUE, WITHOUT NOTICE.

1. A conveyance being held fraudulent and void as against creditors, certain mortgages of the property conveyed, taken by the vendor by way of consideration, were nevertheless held good in the hands of an assignee for value without notice. *Logan, et al.* v. *Brick, et al.*, 206.

2. The answer of the assignee, denying knowledge of fraud in the securities assigned to him and alleging himself to be a *bona fide* purchaser for value, being responsive to the bill, is conclusive unless rebutted by two witnesses or by one witness with corroborating circumstances. *Ib.*

REAL ESTATE.

The owner of a tract of land let the complainant into possession thereof, promising to give it to him; and upon the faith of such promise the complainant built upon, improved and occupied the land. The owner died without having conveyed the same. The

REAL ESTATE—*Continued.*

complainant was held entitled to be protected in equity against an ejectment, brought by the heir at law, to recover possession of the land. *Burton* v. *Duffield*, 130.

See EQUITABLE CONVERSION.

RECEIVER.

Upon a bill filed against a trustee, charging mal-administration of the trust and threats of acts which, if committed, would cause irremediable injury, a receiver was appointed and an injunction ordered, on motion, without previous notice to the trustee. *Davis* v. *Browne*, 188.

REDUCTION TO POSSESSION.

1. The mere omission of a husband to reduce his wife's *chose in action* into his possession, for a lapse of time ordinarily sufficient to raise a presumption of payment, does not raise such presumption, so as to bar the wife's right, by survivorship, to recover such *chose in action* after the husband's death. *Cartmell, Adm'r,* v. *Perkins*, 102.

2. A trustee of a fund in which his wife, with others, was interested, having failed to pay over money collected by him on account of the fund,—*held*, that the wife's share of other money, received by a succeeding trustee on account of the trust fund, was not liable for the unpaid shares of the other *cestuis que trust* in the money collected by her husband. *Jones* v. *Randel, et al.*, 326.

3. In such case, the husband's failure to pay over the money collected by him cannot be taken to be a *reductio ad possessionem* of the wife's share of trust funds, then uncollected. *Ib.*

4. The wife's *chose in action*, not reduced into the husband's possession, cannot be taken for the payment of his debt, at law or in equity. *Ib.*

5. Property of the wife cannot, in equity, be taken for payment of the husband's debt, without subjecting it to her equity, which, under the circumstances of this case, was sufficient to protect the whole fund. *Ib.*

RE-HEARING.

1. A final decree, entered upon the record and signed by the Chancellor, dismissing the bill, and not directed to be without prejudice, is a bar to another bill filed between the same parties for the same subject matter. *Cochran* v. *Couper, Adm'r*, 27.

RE-HEARING—*Continued.*

2. Practice as to re-hearings and bills of review. *Ib.*

3. The complainant, a married woman, had filed a previous bill in equity for arrearages of an annuity, claiming to recover *sui juris* on the ground of a divorce. The bill was dismissed for want of proof of the divorce.—*Held*, that the decree, not being directed to be without prejudice, was a bar to the present bill filed against the same defendant for the same subject matter. *Ib.*

RELIEF.

See DECREE. REMEDIES.

RELIGIOUS SOCIETIES.

1. The English mortmain acts did not extend to the British colonies. *State* v. *Griffith*, 392.

2. The Delaware Statute of 17 GEO. II, for the relief of religious societies, &c., considered; its history and objects. The prohibitions in this statute against testamentary gifts of real estate to religious societies do not affect charitable uses generally. *Ib.*

3. The third section of the Statute of this State which prohibits devises of lands to religious societies, except in the mode therein prescribed, does not apply to devises to charitable uses generally *Griffith* v. *State*, (*Appendix*), 421.

REMEDIES.

1. It is no ground for relief in equity that the debtor in a judgment is deceased and that there is no personal representative of his estate. The creditor has sufficient remedy at law by raising an administration. *Cochran* v. *Cochran, et al.*, 17.

2. Equity will not interfere to restrain the recovery at law of a legacy, on the ground that the legatee is indebted in a bond to the testator payable at a future day. *Hayes, Adm'r* v. *Hayes*, 191.

3. Equity will not interfere to restrain a legatee from an action at law for the legacy, on the ground that he is in contempt for not performing a decree made in another suit for the execution of a new bond, in lieu of the original one given to the testator and since lost. *Ib.*

4. A decree against the legatee for costs in the suit to enforce the execution of a new bond, is no ground for an injunction to restrain an action at law for the legacy, since such costs could be set off in the action at law. *Ib.*

REMEDIES—*Continued.*

5. The cutting of timber is an injury of an irreparable nature, and remediable in equity, by whomsoever committed. *Fleming, Trustee,* v. *Collins, Adm'r,* 230.

6. Equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed. *Ib.*

7. Upon the death of the party committing the waste, the liability to account survives against his administrators. *Ib.*

8. A judgment debtor, having recovered a judgment in another Court against his creditor, is entitled to relief in equity by a decree for set off. *Webster* v. *McDaniel, et al.,* 297.

9. Though both judgments are legal demands, equity will relieve, because they are not judgments recovered in the same Court, so that they could be set off at law under the equitable control of the Court over its own judgments; and there is, therefore, no remedy but in equity. *Ib.*

REVIEW, BILL OF.

1. Practice as to re-hearings and bills of review. *Cochran* v. *Couper, Adm'r,* 27.

2. The complainant, a married woman, had filed a previous bill in equity for arrearages of an annuity, claiming to recover *sui juris* on the ground of a divorce. The bill was dismissed for want of proof of the divorce.—*Held,* that the decree, not being directed to be without prejudice, was a bar to the present bill filed against the same defendant for the same subject matter. *Ib.*

SALE.

A vendor of certain store goods agreed to take them back, if unsold within one year, or to make good the loss upon a re-sale. His bond for $700.00, given subject to a written defeasance declaring it to be for the "security and safety of a forfeiture to the same amount, which the vendor stood bound for in an agreement for the purchase, &c.,—*held* not to have been given for stipulated damages, but as a security for loss actually sustained by vendor's refusal to take the goods back. *Jester* v. *Murphy,* 171.

SEAL.

1. A bond under seal, though voluntary, creates a debt, and is impeachable only for fraud. *Garden, Exr'x* v. *Derrickson, et al.,* 386.

2. Such a bond is enforceable against the grantor, and against all claiming under the grantor as volunteers. *Ib.*

SET-OFF.

1. A legacy, presently payable, cannot be set off in equity against a debt of the legatee to the estate, not yet due. *Hayes, Adm'r* v. *Hayes*, 191.

2. A judgment debtor, having recovered a judgment in another Court against his creditor, is entitled to relief in equity by a decree for set off. *Webster* v. *McDaniel, et al.*, 297.

3. Though both judgments are legal demands, equity will relieve, because they are not judgments recovered in the same Court, so that they could be set off at law under the equitable control of the Court over its own judgments; and there is, therefore, no remedy but in equity. *Ib.*

4. H., being indebted to W. on a note under seal for $109, took from a third party an assignment of a note of W. for $58.83, with the knowledge of W. and with the understanding between the parties, that it would be credited against the note for $109.—*Held*, that the equity to such credit attached to the note for $109, and followed it into the hands of an assignee, though without notice. *Hall* v. *Hickman, et al.*, 318.

SPECIALTIES.

See BOND. SEAL.

SPECIFIC PERFORMANCE.

1. A party, who by his own negligence or default has prevented or unreasonably delayed the full execution of a contract for the sale of lands, will not be relieved by a decree for specific performance. This principle applies to a contract though it be reduced to writing;—*a fortiori*, to a parol contract sought to be enforced on the ground of part performance. *Kinney* v. *Redden, et al.*, 46.

2. The ground upon which equity enforces a parol contract, part performed, is the prevention of fraud upon the party by whom there has been a part performance. To entitle such a party to relief it must appear that he will, in consequence of the part-performance, suffer detriment, unless relieved, and that he has been himself in no default. *Ib.*

3. A vendee, under a parol contract for the sale of lands, was let into possession and permitted to cut timber upon the premises sold; the vendor's title deed was delivered to a conveyancer selected to prepare a conveyance of the premises, and the tenant was referred to the vendee as the person authorized to let the premises for the ensuing year. The vendee withdrew the vendor's

SPECIFIC PERFORMANCE—*Continued.*

title deed from the conveyancer and neglected, on request, to return it or to proceed to the full execution of the contract; also, he neglected to assign to the vendor a judgment which was to be taken in part payment of the purchase money, or to pay any part of the purchase money. Under these circumstances the vendor resold the premises and conveyed them to another purchaser. Bill by the original vendee, for a specific performance, dismissed. *Ib.*

4. The complainant and the defendant, A. entered into a parol contract for an exchange of lands—the complainant agreeing to convey a tract of woodland and pay $300.00 in cash—the defendant, A. agreeing to convey, together with his wife, a tract of marsh, the title to which was held by the wife. Possession was mutually delivered. It was agreed that the parties should meet at the house of G. F. to execute conveyances; but such meeting was delayed and never took place. The defendant, A., cut off the timber from the woodland delivered into his possession under the contract. Afterward the defendant, A., without any tender of performance on his part, or demand upon the complainant for the execution of the contract, sold and conveyed the marsh to the defendant, I. On bill filed by the complainant for a specific performance;—*Held, that*

(1). The defendant, A., was not entitled to abandon the contract and to re-sell the marsh, without first tendering to the complainant a deed for the marsh and demanding performance on his part; that, under the circumstances, the complainant was not in laches.

(2). The defendant, A. was not entitled to abandon the contract, after having cut the timber off the woodland and thereby substantially destroyed its value, so that the complainant could not be placed *in statu quo.* *Burton* v. *Adkins, et al.*, 125.

STATUTE OF FRAUDS.

1. A debtor in failing circumstances gave his bond to one creditor to secure a debt due to such creditor, and as to the balance under a parol trust to pay certain other creditors, per schedule. *Held,* void as to the other creditors, who were not named in the bond and with whom there was no communication. *Comly* v. *Waters, et al.*, 72.

2. Such a transaction does not create a trust in favor of the creditors. The bond is revocable at the will of the obligor; and it is prohibited by the Statute of Frauds. *Ib.*

STATUTES,—CONSTRUED, EXPLAINED, &C.

1. By an Act of the General Assembly certain trustees were authorized to appoint a manager or managers, to institute, carry on and draw a lottery for raising a sum not exceeding $25,000, to be applied to certain public objects; the manager or managers to give bond to the State, with surety to be approved by a Judge, conditioned for a faithful performance of duty in the sale of tickets and drawing of the lottery, and in paying over to the trustees, or their successors, the net proceeds thereof. All expenses were by the act directed to be paid out of the proceeds of the lottery, and the net proceeds to be paid over to the trustees, to be by them applied to the purposes of the act. A bill was filed, alleging that the trustees had exceeded their authority under the act, by undertaking to enter into a contract to grant to certain managers, appointed by them, the privilege of drawing a lottery for a term of years, in consideration of an annual sum, to be paid to the trustees for the purposes of the act; also, alleging that the managers appointed had failed to give bond in conformity with the provisions of the act; also, alleging that the managers had exhausted their authority under the act by drawing more than the sum required.—*Held*, that upon such a bill a court of equity has jurisdiction to restrain the further drawing of the lottery. *State* v. *Maury, et al.*, 141.

2. By Section 94 of the Act of Congress, entitled "An Act to provide Internal Revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, an *ad valorem* duty of five per cent. was imposed upon "all manufactures of cotton, wool, silk, &c.," *or of other materials not in this act provided for.—Held*, that molasses made from sorghum, not being otherwise provided for in the act, was subject to the *ad valorem* duty of five per cent. *Pickering* v. *Day*, 333.

3. Prior to the English Statute of 9 GEO. II, charitable uses in England were subject to no restriction. *State* v. *Griffith*, 392.

4. The English mortmain acts did not extend to the British colonies. *Ib.*

5. The Delaware Statute of 17 GEO. II, for the relief of religious societies, &c., considered; its history and objects. The prohibitions in this statute against testamentary gifts of real estate to religious societies do not affect charitable uses generally. *Ib.*

See also *Griffith* v. *State*, (*Appendix*,) 421.

STATUTES, &c.—*Continued.*

6. The English Statute of Mortmain of 9 George II is not in force in this State. *Griffith* v. *State* (*Appendix*) 421.

7. The jurisdiction of the Court of Chancery to enforce such charitable uses as were void or defective at common law was not derived from the Statute of 43 Elizabeth, but existed prior to and independently of that Statute. *Ib*

STOCK.

Under articles of association, which had been adopted as part of the charter of a bank, it was provided that so long as a stockholder might remain indebted to the bank his stock should not be transferable.—*Held*, that the defendant was not liable in damages for refusing to permit the indorser, while still remaining liable on his indorsement, to transfer his stock on the books of the bank. *McDowell* v. *Bank of W. & B.*, 1.

TENANT FOR LIFE AND REMAINDERMAN.

See CHARGE, 1—(2), (3).

TENDER.

Tender of payment to one of several creditors and a demand from him of an assignment of the security, although the security may not be in his possession, binds all the obligees, and his refusal is equivalent to the refusal of all. *Merriken* v. *Godwin, et al.*, 236.

TITLE.

1. The owner of a tract of land let the complainant into possession thereof, promising to give it to him; and upon the faith of such promise the complainant built upon, improved and occupied the land. The owner died without having conveyed the same. The complainant was held entitled to be protected in equity against an ejectment, brought by the heir at law, to recover possession of the land. *Burton* v. *Duffield*, 247.

2. A purchaser, under a contract for the sale of land, who has accepted a deed and entered into possession will, nevertheless, be relieved in equity against a defect of title afterward discovered by him, *if fraud in the sale was practiced upon him by the vendor.* Otherwise, *it seems*, if the deed were accepted *in the absence of fraud.* *Houston et al.*, v. *Hurley's Adm'rs*, 247.

TRUST AND TRUSTEE.

1. A debtor in failing circumstances gave his bond to one creditor to secure a debt due to such creditor, and as to the balance under a parol trust to pay certain other creditors, per schedule.—*Held*, void as to the other creditors, who were not named in the bond and with whom there was no communication. *Comly* v. *Waters, et al.*, 72.

2. Such a transaction does not create a trust in favor of the creditors. The bond is revocable at the will of the obligor; and it is prohibited by the Statute of Frauds. *Ib.*

3. A voluntary trustee, without contract for compensation, is not entitled to it in equity; though he will be allowed his expenses and saved from loss. *Brooks, Adm'r, et al.*, v. *Egbert* 83.

4. Principles upon which a court of equity controls the exercise of a power to appoint new trustees. *Bailey* v. *Bailey, et al., Exr's*, 95.

5. The court will not prevent the exercise of a discretion given for the appointment of trustees, but will see that it has been duly exercised, so as to subserve the purposes contemplated in the creation of the power. *Ib.*

6. The *cestui que trust*, under a devise of a fund in trust, being authorized, upon the death or refusal of the trustee to act, to appoint "a suitable person" to act in his place.—*held*, that the son of the *cestui que trust*—a young man and without property—was not such "suitable person," nor was he entitled to a decree for the delivery of the trust funds, without security first given to the satisfaction of the Court. *Ib.*

7. A legacy charged upon land, and payable by the devisee of the land, is a trust, falling within the exclusive jurisdiction of courts of equity, and as such is not subject to the equitable defence of lapse of time, by analogy to the Statute of Limitations; otherwise, of a legacy payable by the executor or administrator out of the personal estate, and which is recoverable both at law and in equity. *Cartmell, Adm'r* v. *Perkins*, 102.

8. Lapse of time does not bar a *direct* trust, as between the trustee and *cestui que trust*; otherwise, as to *constructive* trusts. *Ib.*

9. A testator, domiciled in Pennsylvania, after disposing of his estate in eight parts, in order to equalize the distribution of it, set a value upon the several lands devised, and charged each of them,

in the hands of the devisee, with its excess in value over one equal eighth part of the whole estate—such excess to be paid, within six months after the testator's decease, to his executors as part of the residuary estate. The lands were devised to trustees for the several parties interested, the trustees being also the executors. Part of the devised lands were situated in Delaware, and were valued by the testator at $20,000, which sum, upon the settlement of the testamentary accounts, was found to exceed one equal eighth part of the testator's whole estate. On a bill filed by the administrator d. b. n. c. t. a. of the testator and the executor of the survivor of the trustees, to charge the lands in Delaware with the excess, *Held*, that the land sought to be charged, having been devised in trust for one for life (to whom was given the rents and profits) with remainder to his children, the omission of the trustees to collect the excess from the tenant for life is no bar to relief against the remainderman for the principal of the excess. *Colwell, Adm'r* v. *Miles*, 110.

10. An agent or trustee, when called to account under a bill in equity for an irregular or unauthorized exercise of powers, cannot object to making discovery of his transactions, on the ground that they are such as may subject him to a criminal charge, the object of the bill not being to enforce a criminal liability, but only to restrain from further unauthorized acts. *State* v. *Maury, et al.*, 141.

11. Upon a bill filed against a trustee, charging mal-administration of the trust and threats of acts which, if committed, would cause irremediable injury, a receiver was appointed and an injunction ordered, on motion, without previous notice to the trustee. *Davis* v. *Browne*, 188.

12. Mere negligence of a trustee, as well as his active default, may be a breach of trust. *Richards, Trustee* v. *Seal, Adm'r*, 266.

13. Ignorance of the act or default of a co-trustee is no excuse, if that ignorance results from neglect. *Ib.*

14. An investment of a trust fund having been made by trustees, one of them without the knowledge of his co-trustees collected the fund and held it until his death without re-investment. —*Held*, that the co-trustee, who had given no attention to the fund after its original investment, was liable. *Ib.*

TRUST AND TRUSTEE—*Continued.*

15. An ante-nuptial contract, not recorded, raises no equity, at the suit of a debtor to the wife *dum sola*, to restrain the collection of the debt at law by process in the name of the husband and wife. *Hill* v. *Garman, et al.*, 273.

16. Nor is the debtor at any risk in paying the debt. Such payment would protect him against any future claim by the trustee under the contract, who had not interfered to prevent the collection of the debt by the husband. *Ib.*

17. A trust fund, so long as it can be traced, may be followed for the purpose of enforcing the trust. *Barwick, Adm'r.*, v. *White, et al.*, 284.

18. A promissory note, taken by an administrator for proceeds of land of his decedent sold under an order of the Orphans Court for the payment of debts, and shewing on its face the purpose for which it was given, is a trust fund. *Ib.*

19. Upon the death of the administrator, the assignment of the note by his administratrix to pay his debts is a breach of trust and a legal fraud, for which the administratrix and her assignee are liable in equity. *Ib.*

20. The maker of the note, by whom it has been paid, is not a necessary party to a bill to enforce the trust. Neither are the heirs or devisees of the decedent, whose land was sold, necessary parties. The fund belongs to the administrator *de bonis non* of the decedent. *Ib.*

21. Goods bequeathed in trust came to the hands of the administrator c. t. a. who filed an inventory and appraisement of them and charged himself with their value in an administration account. *Held*, that they were not thereby converted, so as to be subjected to execution for the administrator's debts. *Robinson* v. *Burton*, 314.

22. A husband, having reduced to his possession funds to which he became entitled in right of his wife, cannot subject them to a voluntary trust for the wife to the prejudice of creditors. *Russell, et al*, v. *Thatcher, et al*, 320.

23. A trustee having a discretion as to the time and amount of payments to be made of a trust fund for the benefit of a married woman, his refusal to make any payment is a breach of trust, against which the Court will relieve. *Collins* v. *Serverson*, 324.

24. A trustee of a fund in which his wife, with others, was in-

TRUST AND TRUSTEE—*Continued.*

terested, having failed to pay over money collected by him on account of the fund,—*held*, that the wife's share of other money, received by a succeeding trustee on account of the trust fund, was not liable for the unpaid shares of the other *cestuis que trust* in the money collected by her husband. *Jones* v. *Randel, et al*, 326.

25. In such case, the husband's failure to pay over the money collected by him cannot be taken to be a *reductio ad possessionem* of the wife's share of trust funds then uncollected. *Ib.*

26. A devise of lands in trust "to and for the support, maintenance and education of the poor white citizens of Kent County generally," coupled with a direction that no part of the bequest should "be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof," is not void for uncertainty in the description of the objects. *State* v. *Griffith*, 392.

27. A devise to certain charitable uses of a fund, to be distributed "by agents, to be appointed by the Orphans Court or the Levy Court of Kent County, as may be deemed most proper," is not void for uncertainty as to which one of the two Courts shall appoint the agents. Either Court may exercise the power of appointment. If both refuse, this Court will appoint. So, were the power of appointment void for uncertainty, this Court would have power to create the necessary agency. *Ib.*

28. Distinction between limitations of the legal estate and limitations by way of trust, with respect to the degree of certainty requisite in the objects to take. *Ib.*

29. Uncertainty as to the individual beneficiaries, until appointment or selection, is characteristic of a charitable use. *Ib.*

30. An equitable interest vests in the beneficiaries of a charitable use, from the time of their appointment or selection, such as entitles them to enforce their equitable rights. *Ib.*

31. Devise in trust for the benefit of "such only of the poor of Kent County who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof."—*Held* to be a description of the beneficiaries not too uncertain to be carried into effect. *Griffith* v. *State*, (*Appendix*,) 421.

TRUST AND TRUSTEE—*Continued.*

32. Devise of a fund to trustees for the benefit of the poor of Kent County, &c,—"the distribution thereof to be made by agents to be appointed by the Orphans Court or the Levy Court of Kent County, as might be deemed proper."—*Held*, that either the Orphans Court or the Levy Court were competent to appoint the necessary agents for distribution of the fund; but that were it otherwise, or were both the Courts designated to refuse or neglect to make such appointment, the Court of Chancery is competent to supply the required agency. *Ib.*

33. Uncertainty as to the objects of a charitable use is not an objection to its validity. In this respect charitable uses differ from ordinary trusts. If the objects be uncertain, or the particular mode of application fail, the fund may be administered, in England either by the Crown as *parens patriæ* or by the Court of Chancery; in this State such a charity will be administered by the Court of Chancery. *Ib.*

34. A valid trust can never fail for the want of a trustee. *Ib.*

35. Wherever may be the legal estate, if the trust is valid it will be protected and enforced in a court of equity. *Ib.*

VENDOR AND PURCHASER.

1. A vendor of certain store goods agreed to take them back, if unsold within one year, or to make good the loss upon a re-sale. His bond for $700.00 given subject to a written defeasance declaring it to be for the "security and safety of a forfeiture to the same amount, which the vendor stood bound for in an agreement for the purchase &c.,—*held* not to have been given for stipulated damages but as a security for loss actually sustained by vendor's refusal to take the goods back. *Jester* v. *Murphy*, 171.

2. A purchaser under a contract for the sale of land, who has accepted a deed and entered into possession will, nevertheless, be relieved in equity against a defect of title afterward discovered by him, *if fraud in the sale was practiced upon him by the vendor.* Otherwise, *it seems*, if the deed were accepted *in the absence of fraud.* *Houston, et al.* v. *Hurley's Adm'rs*, 247.

VOLUNTARY CONVEYANCE.

1. A voluntary conveyance, though without a fraudulent intent, is void, as against creditors, under the statute of 13 Elizabeth. *Logan, et al.*, v. *Brick, et al.*, 206.

2. Such a conveyance is void *if it tend to hinder and delay creditors*, though it may not otherwise injure them. *Ib.*

VOLUNTARY CONVEYANCE—*Continued.*

3. The answers of the grantor and grantee in a voluntary conveyance, denying a fraudulent intent, though responsive to the bill, is no defence, since such conveyance is, as against creditors, a fraud in law, irrespective of the intent of the parties. *Ib.*

4. A voluntary conveyance is void as against creditors holding debts previously contracted. *Russel, et al.*, v. *Thatcher, et al.*, 320.

5. A voluntary deed set aside, as against a creditor. *Humphries* v. *Wilson*, 331.

6. A bond under seal, though voluntary, creates a debt, and is impeachable only for fraud. *Garden, Exr'x* v. *Derrickson, et al.*, 386.

7. Such a bond is enforceable against the grantor, and against all claiming under the grantor as volunteers. *Ib.*

8. I. G. executed and delivered to her son, F. R. G., a bond for $7,100. Afterward she made voluntary conveyances of her real estate to other children. After her death a judgment upon the bond was recovered against her administrator.—*Held*, that in equity the real estate was bound by the judgment, irrespective of the question whether the bond for which it was recovered was voluntary or not. *Ib.*

See FRAUDULENT CONVEYANCE.

VOLUNTEER.

1. A bond under seal, though voluntary, creates a debt, and is impeachable only for fraud. *Garden, Exr'x* v. *Derrickson, et al.*, 386.

2. Such a bond is enforceable against the grantor, and against all claiming under the grantor as volunteers. *Ib.*

3. I. G. executed and delivered to her son, F. R. G., a bond for $7,100. Afterward she made voluntary conveyances of her real estate to other children. After her death a judgment upon the bond was recovered against her administrator.—*Held*, that in equity the real estate was bound by the judgment, irrespective of the question whether the bond for which it was recovered was voluntary or not. *Ib.*

See VOLUNTARY CONVEYANCE.

WASTE.

1. The cutting of timber is an injury of an irreparable nature and remediable in equity, by whomsoever committed. *Fleming, Trustee* v. *Collins, Adm'r*, 230.

2. Equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed. *Ib.*

3. Upon the death of the party committing the waste, the liability to account survives against his administrators. *Ib.*

WILL.

1. Bill against one charging him as *executor* for payment of a legacy, will not authorize a decree against him personally, as *devisee of land charged with the legacy. Cloud, Adm'r*, v. *Whiteman, Ex'r*, 23.

2. The prayer for general relief does not sustain such a decree. *Ib.*

3. A bequest of personal property to the wife, with a devise that the real estate shall be sold and a fee simple title or titles conveyed, being of equal "tenor" with those by which the testator held the same, is not such a devise as will defeat the widow's claim of dower, or put her to an election. *Kinsey, et al.* v. *Woodward*, 92.

4. A testator, domiciled in Pennsylvania, after disposing of his estate in eight parts, in order to equalize the distribution of it, set a value upon the several lands devised, and charged each of them, in the hands of the devisee, with its excess in value over one equal eighth part of the whole estate—such excess to be paid, within six months after the testator's decease, to his executors as part of the residuary estate. The lands were devised to trustees for the several parties interested, the trustees being also the executors. Part of the devised lands were situated in Delaware, and were valued by the testator at $20,000, which sum, upon the settlement of the testamentary accounts, was found to exceed one equal eighth part of the testator's whole estate. On a bill filed by the administrator d. b. n. c. t. a. of the testator and the executor of the survivor of the trustees, to charge the lands in Delaware with the excess, *Held, that,*

(1.) In determining the existence and amount of the excess, the amount of the personal estate of the testator is to be taken as it is ascertained by the testamentary accounts settled by the Court having jurisdiction at the domicile of the testator.

WILL—*Continned.*

(2.) The land sought to be charged, having been devised in trust for one for life (to whom was given the rents and profits) with remainder to his children, the omission of the trustees to collect the excess from the tenant for life is no bar to relief against the remainderman for the principal of the excess.

(3.) The receipt by trustees of rents and profits sufficient to pay the excess does not, unless paid over to the executor, exonerate the lands, in the hands of the remainderman, from payment of the principal of the excess; otherwise, as to interest on the excess accrued prior to the possession of the remainderman.

(4.) The charge of the excess, being upon an undivided share of certain lands, is not discharged by proceedings for partition, under which the real estate comes to be held in possession by the devisee in severalty. *Colwell, Adm'r.*, v. *Miles*, 110.

5. Equitable conversion of real estate by testamentary direction for sale—how far direction must be unqualified. *In re, Estate of Stevenson*, 197.

6. A testator, after devising his mansion house to his widow for life, provided thus:—"It is my desire that after the decease of my wife (or sooner if she should desire it) my dwelling house, &c., should be sold by my executors, hereinafter named, with the approbation of the Chancellor or an Orphans Court, and the proceeds equally divided among all my children now living, or their legal representatives."—*Held*, that the real estate was equitably converted from the death of the testator. *Ib.*

7. Charitable uses are not within the rule of law against perpetuities. *State* v. *Griffith*, 392.

8. A devise of real estate, with a direction that the same be not sold but rented—"the proceeds arising from such rents" to be applied to certain charitable uses,—*held*, not to be within the law against perpetuities. *Ib.*

9. A devise to certain charitable uses of a fund, to be distributed "by agents, to be appointed by the Orphans Court or the Levy Court of Kent County, as may be deemed most proper," is not void for uncertainty as to which one of the two Courts shall appoint the agents. Either Court may exercise the power of appointment. If both refuse, this Court will appoint. So, were the power of appointment void for uncertainty this Court would have power to create the necessary agency. *Ib.*

WILL—*Continued.*

10. A devise of lands in trust "to and for the support, maintenance and education of the poor white citizens of Kent County generally," coupled with a direction that no part of the bequest should "be applied to the use or benefit of any person or persons residing within the walls of the Poor House, but to be distributed amongst such only of the poor who by timely assistance may be kept from being carried to the Poor House and becoming subjects thereof," is not void for uncertainty in the description of the objects. *Ib.*

11. Uncertainty as to the individual beneficiaries, until appointment or selection, is characteristic of a charitable use. *Ib.*

12. Distinction between limitations of the legal estate and limitations by way of trust, with respect to the degree of certainty requisite in the objects to take. *Ib.*

13. Devise in trust for the benefit of "such only of the poor of Kent County who by timely assiatance may be kept from being carried to the Poor House and becoming subjects thereof."—*Held*, to be a description of the beneficiaries not too uncertain to be carried into effect. *Griffith* v. *State*, (*Appendix*,) 421.

14. Devise of a fund to trustees for the benefit of the poor of Kent County, &c.,—"the distribution thereof to be made by agents to be appointed by the Orphans Court or the Levy Court of Kent County, as might be deemed proper."—*Held*, that either the Orphans Court or the Levy Court were competent to appoint the necessary agents for distribution of the fund; but that were it otherwise, or were both the Courts designated to refuse or neglect to make such appointment, the Court of Chancery is competent to supply the required agency. *Ib.*

See DEVISE. LEGACY.

WITNESS.

The maker of a promissory note, after a judgment recovered against the indorser, not a competent witness for the indorser in a suit in equity to restrain the collection of the judgment. *McDowell*, v. *Bank of W. & B.*, 1.

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